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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1976

No. 76-635

UNITED STATES STEEL CORPORATION, et al., on behalf of themselves and all persons similarly situated,

Appellants,

vs.

MULTISTATE TAX COMMISSION, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLEES

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TABLE OF CONTENTS

Page

QUESTIONS PRESENTED 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 15

THE ARGUMENT 20

I. UNDER THE COMPACT CLAUSE, ONLY THOSE AGREEMENTS OR COMPACTS WHICH TEND TO INCREASE THE POLITICAL POWER OF THE STATES IN A MANNER THAT ENCROACHES ON THE FEDERAL SUPREMACY REQUIRE CONGRESSIONAL CONSENT AND THE COMPACT IN QUESTION IS NOT SUCH AN AGREEMENT OR COMPACT 20

A. The standard to determine the need for congressional consent to a compact or an agreement between states is whether it tends to increase the political power of the states in a manner which may encroach upon the just supremacy of the United States 20

B. The Compact does not increase the political power of the states or encroach upon the just supremacy of the United States 40

II. THE MULTISTATE TAX COMPACT DOES NOT ENCROACH UPON FEDERAL SUPREMACY IN THE AREA OF INTERSTATE COMMERCE BECAUSE IT DEALS WITH A SUBJECT MATTER LEFT EXCLUSIVELY TO THE DOMAIN OF THE STATES ABSENT ANY CONFLICTING FEDERAL LEGISLATION 46

III. THE COMPACT IS NOT INVALID WITHIN THE PURVIEW OF THE COMMERCE, EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE UNITED STATES CONSTITUTION BECAUSE THE COMPACT DOES NOT UNREASONABLY BURDEN INTERSTATE COMMERCE OR UNCONSTITUTIONALLY DISCRIMINATE AGAINST MULTISTATE TAXPAYERS 51

IV. FURTHER ANSWERING APPELLANTS' POINTS. 54

A. Introduction 54

TABLE OF CONTENTS—Continued

Page

B. In arguing that the Compact requires congressional consent, the Appellants ignore the test laid down in Virginia v. Tennessee, supra, as affirmed by this court in Wharton v. Wise, supra, and New Hampshire v. Maine, supra, and contrary to those cases assert that all modern compacts require congressional consent which assertion would result in an unwarranted shift of power to Congress 58

C. Appellants erroneously contend that the Compact is a regional effort which interferes with the national interest and the interests of nonmember states. (Appellants' Br. 35-47) 61

1. Appellants' assertion that the Compact is a regional effort of the western states which conflicts with the interests of nonmember states is not in accordance with the history of the Compact 63

2. The Appellants erroneously argue that the Commission has issued invalid regulations calling for full apportionment of non-business income of multistate-multinational taxpayers, contrary to state law and traditional practices. (Appellants' Br. 13, 26-27, 46, 48) 64-65

3. The Appellants erroneously argue that the Commission has adopted rules and practices for combined reporting (Appellants' Br. 12, 25-26) and that this interferes with the national interest in the conduct of foreign affairs (Appellants' Br. 35-42) and the sovereignty and revenue policies of nonmember states (Appellants' Br. 45) 69

4. Though totally irrelevant, Appellants erroneously argue that "combined reporting" is not a valid workable concept for the division of income 72

D. The Appellants' argument that the Compact has a serious impact on and burdens interstate commerce (Appellants' Br. 42-44, 48) and interferes with the sovereignty and revenue policies of the nonmember states (Appellants' Br. 45-47) erroneously attributes nonuniformity to the Compact and constitutes a rehash of Appellants' erroneous arguments concerning "combined reporting" and "full apportionment of nonbusiness income" 74

TABLE OF CONTENTS—Continued

Page

E. The Appellees' Response to Miscellaneous Arguments and Misstatements of the Appellants 76

V. CONCLUSION 80

SUPPLEMENT A—RESULTS OF A SURVEY ON THE UNIFORMITY OF STATE LAWS BY THE STATE OF INDIANA (February 15, 1977) 83-109

TABLE OF AUTHORITIES

Cases:

Alaska v. Artic Maid, 366 U.S. 199 (1961) 52

Allied Stores of Ohio v. Bowers, 358 U.S. 522 (1959) 53

American Motors Insurance Co. v. Starnes, 425 U.S. 637 (1976) 54

Appeal of Capital Southwest Corp., C.C.H. Cal. Tax Rep. para 204-881 (S.B.E. Jan. 16, 1973) 67

Appeal of U.S. Steel Corp., Appeal No. 73-1-20 (Idaho B.T.A. No. 1 1973) 67

Arizona v. California, 373 U.S. 546 (1963) 35

Bass, Ratcliff & Gretton v. State Tax Commission, 266 U.S. 271 (1924) 70

Bode v. Barrett, 412 Ill. 204, 106 N.E.2d 521 (1952), aff'd 344 U.S. 583 (1953) 29, 38, 45, 46

Butler Bros. v. McColgan, 17 Cal.2d 664, III P.2d 334, aff'd 315 U.S. 501 (1942) 70, 72

Cashey Baking Co. v. Virginia, 313 U.S. 117 (1941) 52

Champion International Corp. v. Bureau of Revenue, 88 N.M. 411, 540 P.2d 1300 (1975) 68

Colonial Pipeline v. Traigle, Collector of Revenue of Louisiana, 421 U.S. 100 (1975) 48

Complete Auto Transit v. Brady, ... U.S. ....., 51 L. Ed. 2d 326, 97 S. Ct. 1076 (1977) 48

Cooley v. Board of Wardens of the Port of Philadelphia, et al., 53 U.S. (12 How.) 298, 13 L. Ed. 966 (1851) ...39, 46

Dixie Wholesale Grocery Co. v. Martin, 278 Ky. 705, 129 S.W.2d 181 (1939) 28, 29, 38

Dorgan v. International Business Machines Corp., United States District Court for the District of North Dakota, No. A1-74-24 30

TABLE OF AUTHORITIES—Continued

Page

Dorgan v. International Harvester Co., United States District Court for the District of North Dakota, No. A1-74-25 30

Dover v. Portsmouth Bridge, 17 N.H. 200 (1845) 33, 38

Edison-California Stores v. McColgan, 30 Cal.2d 472, 183 P.2d 16 (1947) 70

Federal Power v. Union Electric Company, 381 U.S. 90 (1965) 47

Fisher v. Steele, 39 La.Ann. 447, 1 So. 882 (1887).....33, 39

Flint v. Stone Tracy Co., 220 U.S. 107 (1911)..... 67

F.W. Woolworth Co. v. Commissioner of Taxes, 130 Vt. 544, 298 A.2d 839 (1972)..... 67

F.W. Woolworth Co. v. Director of Div. of Tax, 45 N.J. 466, 213 A.2d 1 (1965)..... 67

General American Tank Car Corp. v. Day, 270 U.S. 367 (1926) 52

General Motors Corp. v. Washington, 377 U.S. 436 (1964). 57

General Trading Co. v. State Tax Commission, 322 U.S. 335 (1944) 52

Great Lakes Pipeline Co. v. Commissioner of Tax., 272 Minn. 403, 138 N.W.2d 612 (1965), app. dismissed, 384 U.S. 718 (1966) 67

Gregg Dyeing Co. v. Query, 286 U.S. 472 (1932)..... 52

Gulf Oil Corp. v. Morrison, 120 Vt. 324, 141 A.2d 671 (1958) 67

Ham v. Maine-New Hampshire Interstate Bridge Authority, 92 N.H. 268, 30 A.2d 1 (1943).....31, 38

Henneford v. Silas-Mason Co., 300 U.S. 577 (1937)..... 52

Hinson v. Lott, 75 U.S. 148 (1869)..... 52

Holmes v. Jennison, et al., 39 U.S. (14 Pet.) 540 (1840) 22, 23, 59

International Harvester v. Department of Tax., 322 U.S. 435 (1944) 67

Kinnear, et al. v. The Hertz Corporation, 86 Wn.2d 407, 545 P.2d 1186 (1976) 30

Landes v. Landes, 1 N.Y.2d 358, 135 N.E.2d 562, 153 N.Y.S.2d 14, app. dismissed 352 U.S. 948 (1956).....31, 39

Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973) 53

TABLE OF AUTHORITIES—Continued

Page

Louisiana v. Texas, 176 U.S. 1 (1900)..... 21

McHenry County, et al. v. Brady, 37 N.D. 59, 163 N.W. 540 (1917) 33, 39

Madden v. Kentucky, 309 U.S. 83 (1939) 53

Metropolitan v. Brownell, 294 U.S. 580 (1935)..... 54

Montgomery Ward & Co. v. Commissioner of Tax., 276 Minn. 479, 151 N.W.2d 294 (1967) 67

Multistate Tax Commission, et al. v. Sperry Rand Corporation, United States District Court for the District of Idaho, No. 1-75-168 30

Nelson v. Sears Roebuck & Co., 312 U.S. 359 (1941)..... 52

New Hampshire v. Maine, 426 U.S. 363 (1976) .....16, 17, 19 (various)

Northwest States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959) 39, 47

Parker v. Brown, 317 U.S. 341 (1942) 48

Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531 (1914).. 52

Polish National Alliance v. National Labor Relations Board, 322 U.S. 643 (1944)..... 47

Re 620 Church Street Building Corp., 299 U.S. 24 (1936).. 52

Roberts Tobacco Co. v. Department of Revenue, 322 Mich. 519, 34 N.W.2d 54 (1948).....28-29, 38

St. Louis & S.F.R. Co. v. James, 161 U.S. 545 (1896)..... 39

Sperry & Hutchinson v. Department of Revenue, 279 Or. 329, 527 P.2d 729 (1974)..... 68

State v. Doe, 149 Conn. 216, 178 A.2d 271 (1962).....31, 39

Stebbins v. Riley, 268 U.S. 137 (1925) 53

Sterns v. Minnesota ex rel. Marr, 179 U.S. 223 (1900).... 21

Superior Oil Co. v. Franchise Tax Board, 34 Cal. Rptr. 545, 386 P.2d 33 (1963)..... 70

Underwood Typewriter Co. v. Chamberlain, 354 U.S. 113 (1920) 70, 73

Union Branch R.R. v. E.T. & Ga. R.R. Co., 14 Ga. 327 (1853) 31, 32, 38

Virginia v. Tennessee, 148 U.S. 503 (1893), 37 L.Ed. 537, 13 S. Ct. 728 (1893).....16, 19 (various)

Virginia v. West Virginia, 246 U.S. 565 (1918).....34, 35, 37

TABLE OF AUTHORITIES—Continued

Page

Wharton v. Wise, 153 U.S. 155 (1894), 38 L.Ed 669, 14 S. Ct. 783 (1894) ..... 19, 21, 22 (various)

Williams v. Stockham Valves & Fittings, Inc., 358 U.S. 450 (1959) 47

Wisconsin v. J.C. Penney Co., 311 U.S. 435 (1940) 67

Constitution and Statutes:

Constitution of the United States

Article 1, Section 8 (Commerce Clause) 1

Article 1, Section 10, Clause 3 (Compact Clause) 1, 15, 20, 22, 44, 45

Fourteenth Amendment 2, 51, 80

Fourth Amendment 80

Internal Revenue Code Section 482 ..... 72, 79

P.L. 86-272, 73 Stat. 555, 15 U.S.C. 381 et seq 5

28 U.S.C. §§ 2281, 2284 2

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Page

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First Annual Report of the Multistate Tax Commission (1968) 64

H. Rep. No. 1480, 88th Cong., 2d Sess. (1964) 66, 67

H. Rep. No. 952, 89th Cong., 1st Sess. (1965) 66, 70

Keesling, A Current Look at the Combined Report and Uniformity in Allocation Practices, 42 Journal of Taxation 106 (Feb. 1975) 70

Multinational Corporations and Income Allocation Under Section 482 of the Internal Revenue Code, 89 Harv. L. Rev. 1202 ..... 70, 72

94 Cong. Record 5560, 5561, 5563, 5570, 5585, 5676, 5677, 5759, 5766 (1948) 33

Ninth Annual Report of the Multistate Tax Commission (1976) 59, 64

Recommendations of the Task Force on Foreign Source Income of the Committee on Ways & Means U.S. House of Representatives, 95th Cong., 1st Sess. (1977) 79-80

Results of a Survey of the Uniformity of State Laws by the State of Indiana (Feb. 15, 1977) (Supplement A) 66, 70, 83-109

Revenue Administration, National Association of Tax Administrators, 34th Annual Conference, Chicago, Illinois (1966) 64

Seventh Annual Report of the Multistate Tax Commission (1974) 67, 71, 78

Thirteenth Resolution of the National Association of Tax Administrators, 45th Annual Meeting, Williamsburg, Virginia, June 3, 1977 76

Weinfeld, What Did the Framers of the Federal Constitution Mean By Agreements or Compacts? 3 U. Chi. L. Rev. 453 (1936) 43-44

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QUESTIONS PRESENTED

1. Is the Multistate Tax Compact invalid on its face under Section 10, Article I of the Constitution of the United States and should its Commission be disbanded because the Compact has not been consented to by Congress?

2. Does the Compact impose an unreasonable burden on or discriminate against interstate commerce in violation of Section 8 of Article I of the Constitution of the United States?

3. Does the Compact deny multistate taxpayers due process and equal protection of the laws in violation of the Fourteenth Amendment of the U.S. Constitution?

STATEMENT OF THE CASE

Appellants' "Statement" of the case is inaccurate, incomplete, misleading and contains numerous statements and opinion not supported by the record.

This action involves the validity of the Multistate Tax Compact (hereinafter referred to as the "Compact") on its face. In their Amended Complaint (A. 2-10), the Appellants asserted that the Compact violates certain provisions of the United States Constitution and sought declaratory and injunctive relief against its enforcement. They asked that the Compact be declared invalid on its face and that its governing body, the Multistate Tax Commission, be disbanded (A. 9-10). The Appellees, asserting that only questions of law were involved, moved for a summary judgment and requested that the motion be heard by a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284 (A. 20-22).

As required by local court rule 9(g), in support of Appellees' motion for summary judgment, Appellees filed a "Statement Under Rule 9(g)" (A. 23-37), supported by the Affidavit of Eugene Corrigan, Executive Director of the Multistate Tax Commission (A. 38-41) and a copy of the Compact as enacted by the State of Washington which is typical of the Compact enacted by all member states (Jur. St. App. E. 54a-79a, A. 42).

There is no dispute as to any material fact in this cause including the facts in the 9(g) statement and the Corrigan affidavit (A. 43).

The Multistate Tax Commission (hereinafter referred to as the "Commission") is the administrative agency for the Compact and is created by Article VI of the Compact (A. 33). The members of the Commission are the tax administrators of the member states (A. 34). It is undisputed (and indisputable) that:

1. Neither the Commission nor the members thereof acting in concert have any power to levy taxes, to specify a tax base, to fix tax rates, or to collect taxes from any of the appellants or any other person whatsoever (A. 34; Jur. St. App. A. 11a).

2. Individual member states of the Compact retain exclusive control over any and all legislation or administrative actions including (i) the rate of tax; (ii) what is included in any tax base, such as what constitutes taxable income or lawful deductions therefrom for income tax purposes; and (iii) the means and methods of determining any tax liability and of collecting any taxes which may be determined to be due any such member state, whether or not the Commission has conducted a joint audit of any taxpayer on behalf of such member state (A. 36; Jur. St. App. A. 11a-12a).

3. The conduct of a joint audit by the Commission on behalf of member states or subdivisions

thereof is at the sole discretion and option of each member state or subdivision thereof. In the event that a member state or subdivision thereof desires to participate in a joint audit of any multistate taxpayer by the Commission, such member state or subdivision thereof may request the Commission to perform the audit on its behalf and in such case the Commission may conduct such audit in accordance with the provisions of Article VIII of the Compact (A. 34-35; Jur. St. App. A. 11a).

4. Any grievance that a taxpayer may have with the results of a Commission audit or the tax liability resulting therefrom is justiciable in the taxing state in accordance with the same procedures governing the grievances of intrastate taxpayers (Jur. St. App. A. 12a).

5. Any uniform rules, regulations or forms adopted by the Commission are advisory only to the member states and have no binding effect on any member state or any taxpayer whatsoever. Each member state of the Commission has the right and power to reject *in toto*, disregard, amend, or modify any rules, regulations or forms of the Commission; and the rules and regulations or forms of the Commission have no force and effect in any member state unless adopted by such member state in accordance with that state's own laws and procedures for the adoption of rules and regulations or forms (A. 36; Jur. St. App. A. 11a). If so adopted, they become the rules, regulations and forms of the adopting state.

6. The laws with respect to the maintenance of

records by multistate taxpayers are the laws of the individual member states and the Commission has no power to direct any multistate taxpayer to keep or maintain any particular records (A. 35).

Congress, other than by enactment of minimal jurisdictional standards under Public Law 86-272, has not enacted any statute which in any way regulates or controls the levying and collection of income taxes, sales taxes, use taxes, capital stock taxes or gross receipts taxes by any state or its political subdivision as pertains to the Appellants or corporations similarly situated (A. 36-37; Jur. St. App. A. 12a-13a).

After analyzing the constitutional issues in light of the undisputed facts, the three-judge court below held:

> "* * * we find the Compact to be lawful, and the Compact's creation, the Commission, to be a lawfully constituted body." (Jur. St. App. A. 20a)

The court based its holding upon the following findings:

1. There is no material issue of fact in dispute. (Jur. St., App. A. 3a).

2. The Compact does not tend to increase the political power of the member states or encroach upon or interfere with federal supremacy and therefore does not violate the Compact Clause (Jur. St. App. A. 11a, 12a).

3. The Compact does not unreasonably burden or discriminate against interstate commerce (Jur. St. App. A. 14a, 15a, 20a).

4. The Compact does not deny Appellants equal protection or due process of law (Jur. St. App. A. 20a).

5. The Compact does not subject Appellants to unreasonable searches and seizures (Jur. St. App. A. 20a, 21a).

The Appellants' argument on appeal is confined almost exclusively to the congressional consent question. As to this question, they abandon any consideration of the Compact provisions. They refer to none of them in their argument, but rely instead on conclusionary statements of their own choosing, which are not supported by the record and are concerned with wholly irrelevant matters.

While in their statement of the case, Appellants attribute various "powers" to the Commission, they fail to inform the Court that the Commission functions only as an advisory agency and that its work product is not binding on anyone—State or taxpayer. It is misleading for the Appellants to label the Commission an independent body and to endow it with various powers when it is really only an advisory agency of the member states. The Appellees that are the individual administrators of their own tax laws deny that they have surrendered to the Commission any of their powers to fix and determine the tax liabilities of any taxpayers. It is clear that under the Compact the member states have not surrendered any of their powers.

At this juncture it is important to examine the

Compact language to see what it does and does not do.[1] It contains twelve Articles.

Article I of the Compact states the purposes of the Compact are to:

> "1. Facilitate proper determination of state and local tax liability of multistate taxpayers, including equitable apportionment of tax bases and settlement of apportionment disputes;
> "2. Promote unformity or compatibility in significant components of tax systems;
> "3. Facilitate taxpayer convenience and compliance in the filing of tax returns and other phases of tax administration;
> "4. Avoid duplicate taxation."

It contains no grant of power to the Commission or its executive director.

Article II contains various definitions and has no operative effect apart from other provisions of the Compact.

Article III, § 1 and Article IV allow interstate taxpayers an option to (i) divide their income in accordance with the provisions of the Uniform Division of Income for Tax Purposes Act (UDITPA) promulgated by the National Conference of Commissioners on Uniform State Laws (see Volume 9a, Uniform Laws Annotated, p. 448) or (ii) in accordance with otherwise applicable state law. Clearly, any state may independently, apart from any compact, provide an interstate taxpayer with this same option. In states, such as Michigan and Montana, which in-

[1]The District Court set forth a proper analysis of the provisions of the Compact (Jur. St. App. A. 5a-9a). Those provisions are also analyzed in the Rule 9(g) Statement of the Appellees (A. 25-33). The full text of the Compact is contained in Jur. St. App. E. 54a-79a.

corporate UDITPA in their income tax laws, it has no practical force or effect.

Article III, § 2 allows another option to interstate taxpayers. It provides that each party state or any subdivision thereof which imposes an income tax must allow a taxpayer meeting certain requirements to file a short form and to compute income tax liability simply on the basis of a percentage of sales volume within the state. Again like Article III, § 1 and Article IV, this option is essentially a uniform act and could be adopted by any state independently of any compact even though it has been specifically devised for the Compact. *Neither Article III nor Article IV grants any power to the Commission or to its Executive Director.*

Article V adopts certain substantive provisions relating to sales and use tax laws. Again, the provisions of this article are essentially a uniform act which could have been adopted independently of any Compact. Those provisions do not grant any powers to the Commission or to its Executive Director.

Article VI pertains to the Commission's operations. Sections 1, 2 and 4 involve the creation and internal management of the Commission.

Section 1 provides for membership on the Commission, voting rights, meetings, personnel, offices, adoption of bylaws, etc. The Commission is composed of one member from each party state who is the head of the state agency charged with the administration of the types of taxes to which the Compact applies. Alternates and nonvoting representation are pro-

vided for. An executive director is provided for and he is given the power to appoint and discharge personnel "irrespective of the civil service, personnel or other merit system laws of party states." This is a matter that does not rise to constitutional proportions nor does it concern Appellants or any other taxpayer.

Section 2 provides for an executive committee to function according to the bylaws and empowers the Commission to create advisory and technical committees, membership on which may include any private individuals and public officials.

Section 4 is concerned with the finances of the Commission.

Section 3, the "powers" provision, generally covers the fields of research, dissemination of information, and proposal of recommendations. It reads:

> "In addition to powers conferred elsewhere in this compact, the commission shall have power to:
> (a) Study state and local tax systems and particular types of state and local taxes.
> (b) Develop and recommend proposals for an increase in uniformity or compatibility of state and local tax laws with a view toward encouraging the simplification and improvement of state and local tax law and administration.
> (c) Compile and publish information as in its judgment would assist the party states in implementation of the compact and taxpayers in complying with state and local tax laws.
> (d) Do all things necessary and incidental to the administration of its functions pursuant to this compact."

These "powers" do not include anything that have any compulsory effect on the states or taxpayers. They are merely powers to advise and to make recommendations to the party states. Any association of the states could perform the same function.

Article VII provides that the Commission may adopt uniform regulations and forms for the administration of various types of taxes in the party states when such taxes involve uniform or similar provisions of laws among the party states. This article also provides for certain procedures necessary for the adoption of any regulations and forms by the Commission. Section 3 provides that such uniform regulations *to be legally effective must be adopted by the individual states, in accordance with their own laws and procedures for the adoption of regulations.* Thus, the Commission's function under Article VII is to make recommendations only. This function could be performed by groups such as the National Association of Tax Administrators, the Council of State Governments, the Conference of Commissioners on Uniform State Tax Laws, the American Bar Association or by any ad hoc group of tax administrators or even any individual or entity whatsoever. The only regulations the Commission has adopted are those pertaining to Article IV of the Compact.[2]

Article VIII pertains to joint audits and by its

[2]These regulations were adopted on February 21, 1973. They are set out as Appendix J, pp. 64-84 of the Seventh Annual Report of the Multistate Tax Commission. Contrary to Appellants' argument, these regulations distinguish between business and nonbusiness income and provide for the specific allocation of non-business income. See *infra*, pages 64-68 for a fuller discussion of this subject matter.

provisions is in force only in those party states that specifically provide therefor by state statute. Section 2 of Article VIII permits a party state or subdivision thereof to request the Commission to perform an audit on its behalf. It further provides that in responding to a request of a party state the Commission "shall have access to and may examine, at any reasonable time, such accounts, books, papers, records, and other documents and any relevant property or stock of merchandise" of any taxpayer subject to the joint audit. *The Commission merely acts pursuant to such request as an agent of the requesting party states and in conformity with the laws of the requesting party states.*

Section 3 of Article VIII provides that the Commission may require the attendance of any person within the state where it is conducting an audit for purpose of giving testimony with respect to any account, book, paper, document, or other record, property or stock of merchandise being examined in connection with the audit. It further provides that if the person is not within such state he may be required to attend for such a purpose within the state of which he is a resident provided that state has adopted Article VIII of the Compact.

Section 4 of Article VIII provides that:

"The Commission may apply to any court having the power to issue compulsory process for orders in aid of its powers and responsibilities pursuant to this Article and any and all such courts shall have jurisdiction to issue such orders. Failure of any person to obey any such order

> shall be punishable as contempt of the issuing court. If the party or subject matter on account of which the commission seeks an order is within the jurisdiction of the court to which application is made, such application may be to a court in the state or subdivision on behalf of which the audit is being made or a court in the state in which the object of the order being sought is situated. The provisions of this paragraph apply only to courts in states that have adopted this article."

Section 5 of Article VIII gives the Commission the power to decline to perform any audit requested if it finds that its available personnel or other resources are insufficient for the purpose or that in the terms requested the audit is impracticable of satisfactory performance. It further provides that:

> "If the commission, on the basis of its experience, has reason to believe that an audit of the particular taxpayer, * * * would be of interest to a number of party states or their subdivisions, it may offer to make the audit or audits, the offer to be contingent on sufficient participation therein as determined by the commission."

Section 6 of Article VIII contains the confidentiality provision and provides:

> "Information obtained by any audit pursuant to this article shall be confidential and available only for tax purposes to party states, their subdivisions, or the United States. Availability of information shall be in accordance with the laws of the states or subdivisions on whose account the commission performs the audit, and only through the appropriate agencies or officers of such states or subdivisions. Nothing in this article shall be construed to require any taxpayer to keep records for any period not otherwise required by law."

Section 7 of Article VIII reads:

> "Other arrangements made or authorized pursuant to law for cooperative audit by or on behalf of the party states or of any of their subdivisions are not superseded or invalidated by this article."

Section 8 of Article VIII prohibits the Commission from making any charges for an audit against any taxpayer.

The power of the Commission pursuant to Article VIII is simply to gather audit information from the taxpayer subject to a joint audit and to turn this information over to the respective states requesting the joint audit for what use they wish to make of it. It is no different from the power possessed by individual state tax administrators to require the disclosure of facts necessary for audit purposes.

Article IX pertains to arbitration. Section 3 of Article IX gives the taxpayer an option to submit certain apportionment or allocation disputes to an arbitration panel. Section 1 specifically provides that "whenever the commission finds a need for settling disputes concerning apportionments and allocations by arbitration, it may adopt a regulation placing this article in effect * * *" This article is not in effect at the present time.

Article X, § 1 provides that the Compact shall enter into force when enacted into law by any seven states. Section 2 of Article X permits a party state to withdraw from the Compact by enacting a statute

repealing the same and further provides that withdrawals shall not affect any liability already incurred by or chargeable to a party state prior to the time of withdrawal. Section 3 of Article X preserves proceedings commenced before an arbitration board prior to withdrawal.

Article XI provides:

> "Nothing in this compact shall be construed to:
> (a) Affect the power of any state or subdivision thereof to fix rates of taxation, except that a party state shall be obligated to implement Article III, § 2 of this compact.*
> (b) Apply to any tax or fixed fee imposed for the registration of a motor vehicle or any other tax on motor fuel, other than a sales tax: PROVIDED, That the definition of 'tax' in Article VIII 9 may apply for the purposes of that article and the commission's power of studying recommendations pursuant to Article IV 3 may apply.
> (c) Withdraw or limited jurisdiction of any state or local court or administrative officer or body with respect to any person, corporation, or other entity or subject matter, except to the extent that such jurisdiction is expressly conferred by or pursuant to this compact upon another agency or body.
> (d) Supersede or limit the jurisdiction of any court of the United States."

The implementation of Article III, § 2 of the Compact is up to the legislature of the respective states and the Commission has no power concerning the same.

Article XII states that the Compact shall be liberally construed so as to effectuate the purposes thereof and further provides:

> "The provisions of this compact shall be severable and if any phrase, clause, sentence or provision of this compact is declared to be contrary to the constitution of any state or the United States or the applicability thereof to any government agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government agency, person or circumstance shall not be affected thereby. * * *"

An examination of the provisions of the Compact thus indicates that it is a package of arrangements which traditionally have been used, independently of any formal compact, to further interstate uniformity and cooperation, such as uniform or reciprocal acts. It creates a body of state tax officials to make advisory recommendations with respect to statutory or administrative changes. All of these things recommended by the Commission may be put into operation only by the individual states themselves, acting either through their legislatures or their individual tax administrators.

The only question really argued by Appellants in this case is whether such a Compact requires congressional consent within the purview of the decisions of this Court which have interpreted the scope of the compact clause (Section 10, Article I, Clause 3, Constitution of the United States).

SUMMARY OF ARGUMENT

I

The basic question on appeal is whether the

* (This allows certain taxpayers to elect, at their option, certain procedures.)

Compact requires congressional consent. This is resolved by an examination of the provisions of the Compact and determining which of those provisions, if any, require congressional consent before they can be placed in operation by the member states. This poses only a question of law (Jur. St. App. A. 3a).

In *Virginia v. Tennessee*, 148 U.S. 503 (1893), this court determined that only those compacts or agreements which shifted political power among the states in a manner which tended to encroach upon or interfere with federal supremacy required congressional consent. The *Virginia v. Tennessee* interpretation of the compact clause has been universally followed since its pronouncement in 1893 and was recently reaffirmed by this court in *New Hampshire v. Maine*, 426 U.S. 363 (1976). It is not dicta and has not been limited to the settlement of boundary disputes. Furthermore, the *Virginia v. Tennessee* test is consistent with the purpose of the compact clause. It protects federal supremacy and at the same time permits the states the freedom to deal with their own affairs without the control of Congress. It represents a reasonable balance between states' rights and federal supremacy in our federal system. It should be followed by this court in determining the validity of the Compact.

Application of the *Virginia v. Tennessee* test to the Compact clearly reveals that it is not the type of "compact or agreement" which requires congressional consent. The Compact does not involve any

shift of political power among the states and it does not encroach upon any area of federal supremacy. It consists solely of uniform laws, an advisory mechanism for the uniform interpretation and application of those laws, and an advisory mechanism for otherwise developing uniformity and compatibility in state and local taxation of multistate businesses.

The Compact has nothing to do with the subject matter of worldwide combined reporting, and even if it did, it could not interfere with the national interest and the conduct of foreign affairs. Any international treaty or agreement of the United States concerning any subject matter dealt with by the Compact would override the Compact provisions under the supremacy clause and leave the federal government free to deal with foreign affairs as it sees fit. Furthermore, there is nothing in the Compact that interferes with the sovereignty and revenue policies of nonmember states.

Thus, the *Virginia v. Tennessee* test as affirmed by this court in *New Hampshire v. Maine*, *supra*, upholds the validity of the Compact without congressional consent. Contrary to Appellants' argument, this case does not involve the question of whether or not the Compact is being administered properly. Appellants ask in their Complaint that the Compact be declared invalid on its face (A. 9) and do not contend that it "is being administered other than according to its terms. * * *" (Jur. St. App. A. 3a).

II

The Compact is not unconstitutional since it has no real impact on interstate commerce. The enactment of uniform legislation by the member states in an area not acted on by Congress and provision for uniform administration of such legislation by the advisory function of the Commission does not interfere with Congress' power to regulate interstate commerce or place an unconstitutional burden on interstate commerce (Jur. St. App. A. 13a-20a).

"There is nothing inherent in the problems of multistate tax administration that would require federal regulation; nor has Congress yet identified these problems as a matter of peculiar federal concern." (Jur. St. App. A. 13a) "The fact that the Compact might promote a consensus among party states on principles of allocation of revenues or other matters does not create an impermissible burden upon interstate commerce." (Jur. St. App. A. 14a)

III

The classifications employed in the Compact applicable to Appellants and other multistate taxpayers "is a permissible legislative response to what is perceived as the different circumstances of the multistate taxpayer", (Jur. St. App. A. 20a) and does not deny Appellants equal protection or due process of law (Jur. St. App. A. 15a-20a).

IV

In arguing that the Compact requires congressional consent, Appellants have pointed to no pro-

vision of the Compact which requires congressional consent and ignore the test laid down by this court in *Virginia v. Tennessee*, *supra*, and which was established as controlling precedent by this court in *Wharton v. Wise*, 153 U.S. 155 (1894) and *New Hampshire v. Maine*, *supra*. Rather, Appellants rely on other tests of their own choosing and on what they claim is maladministration of the Compact. In support of this argument, Appellants rely on matters (1) which are without the record in this cause; (2) which are irrelevant and immaterial; (3) which have nothing to do with the administration of the Compact by the Commission; and (4) which are contrary to fact or are merely speculative. Since administration of the Compact is not the question at issue, Appellants' argument should be disregarded by this court. Furthermore, even if the Compact were being administered improperly, the Appellants would have ample remedies under state law to correct any errors that affect any of their legal rights. Appellants are not champions of any rights of nonmember states or the federal government.

Appellants' arguments were fully discussed and answered by the lower court and its judgment should be affirmed by this court.

THE ARGUMENT

I

UNDER THE COMPACT CLAUSE, ONLY THOSE AGREEMENTS OR COMPACTS WHICH TEND TO INCREASE THE POLITICAL POWER OF THE STATES IN A MANNER THAT ENCROACHES ON THE FEDERAL SUPREMACY REQUIRE CONGRESSIONAL CONSENT AND THE COMPACT IN QUESTION IS NOT SUCH AN AGREEMENT OR COMPACT.

A. The standard to determine the need for congressional consent to a compact or an agreement between states is whether it tends to increase the political power of the states in a manner which may encroach upon the just supremacy of the United States.

The issue of whether or not the Compact is invalid for lack of congressional consent involves an interpretation of Article I, § 10, clause 3 of the United States Constitution, which reads in material part:

> "No State shall, without the Consent of the Congress * * * enter into any Agreement or Compact with another State, or with a foreign power * * *"

This language was interpreted in the early case of *Virginia v. Tennessee*, 148 U.S. 503 (1893) as follows:

> "Looking at the clause in which the terms 'compact' or 'agreement' appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States." (148 U.S. 519)

This interpretation was reaffirmed as the controlling test in *New Hampshire v. Maine*, *supra*, 426 U.S. 363 (1976), and has been quoted with approval in *Wharton v. Wise*, *supra*, 153 U.S. 155 (1894); *Sterns v. Minnesota ex rel. Marr*, 179 U.S. 223 (1900); and *Louisiana v. Texas*, 176 U.S. 1 (1900).

In *New Hampshire v. Maine*, *supra*, this Court affirmed the *Virginia v. Tennessee* test as follows:

> "New Hampshire suggests, however, that acceptance of the consent decree without an independent determination by the Court as to the validity of the legal principles on which it is based would be a circumvention of the Compact Clause, Art. I, § 10, cl. 3. The premise of this argument is that the proposed settlement is an "Agreement or Compact" within the meaning of the Clause and thus requires the consent of Congress to be effective. We disagree.
>
> "The application of the Compact Clause is limited to agreements that are 'directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.' *Virginia v. Tennessee*, 148 US 503, 519, 37 L Ed 537, 13 S Ct 728 (1893). Whether a particular agreement respecting boundaries is within the Clause will depend on whether 'the establishment of the boundary line may lead or not to the increase of the political power or influence of the States affected, and thus encroach or not upon the full and free exercise of Federal authority.' Id., at 520, 37 L Ed 537, 13 S Ct 728. See *Wharton v.*

Wise, 153 US 155, 168-171, 38 L Ed 669, 14 S Ct 783 (1894).

"The proposed consent decree plainly falls without the Compact Clause under this test. New Hampshire and Maine are not here adjusting the boundary between them; the boundary was fixed over two centuries ago by the 1740 decree, and the consent decree is directed simply to locating this already existing boundary. Accordingly, neither State can be viewed as enhancing its power in any sense that threatens the supremacy of the Federal Government. * * *" (426 U.S. 363)

Because of Appellants' argument that the test of *Virginia v. Tennessee*, *supra*, as affirmed by this court in *Wharton v. Wise*, *supra*, and *New Hampshire v. Maine*, *supra*, is of limited application, it might be well to examine the history of the compact clause.

Read literally, Article I, Section 10, Clause 3 of the Constitution of the United States could be interpreted to mean that all interstate compacts or agreements require the consent of Congress before they can come into operation. This is apparently the erroneous view of the Appellants (except for certain boundary disputes) which they seek to have this court adopt.

Holmes v. Jennison, et al., 39 U.S. (14 Pet.) 540 (1840), is cited in support of this interpretation. The issue in that case, however, was whether an extradition agreement between the governor of Vermont and a Canadian official violated the compact clause because it was entered into without congressional consent. Chief Justice Taney announced that it did and that it made no difference whether the agreement was in writing or was merely a verbal understanding between the governor of Vermont and the Canadian official. But this did not involve a compact or agreement between states. Obviously, Vermont was encroaching upon federal supremacy in foreign affairs in dealing with Canada. Hence, *Holmes* is not support for the Appellants' rigid interpretation of the compact clause. As noted by one commentator:

"* * * It is understandable that greater circumspection should have been manifested in judging arrangements with foreign powers and arrangements between sister states, but this need not have led to a harsh construction of the compact clause. * * *"[3]

The next case by the United States Supreme Court on the scope of the compact clause was *Virginia v. Tennessee*, *supra*, 148 U.S. 503 (1893), in which the court refused to apply to a compact between sister states the criteria stated for control of foreign affairs in Justice Taney's opinion in *Holmes*, *supra*.

Virginia v. Tennessee, *supra*, involved a boundary dispute. The two states had, by agreement, appointed commissioners to establish the boundary. The legislatures of each state ratified the boundaries as established by the commissioners. In discussing the implications of the compact clause, with respect

[3]Engdahl, "Characterization of Interstate Arrangements: When is a Compact Not a Compact," 64 Mich. L. Rev. 63, 88 (1965).

to this agreement, the court stated as follows at 148 U.S. 503, 517-519:

> "Is the agreement made without the consent of Congress, between Virginia and Tennessee, to appoint commissioners to run and mark the boundary line between them, within the prohibition of this clause? The terms 'agreement' or 'compact' taken by themselves are sufficiently comprehensive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects; to those to which the United States can have no possible objection or have any interest in interfering with, as well as to those which may tend to increase and build up the political influence of the contracting States, so as to encroach upon or impair the supremacy of the United States or interfere with their rightful management of particular subjects placed under their entire control.
>
> "There are many matters upon which different States may agree that can in no respect concern the United States. If, for instance, Virginia should come into possession and ownership of a small parcel of land in New York which the latter State might desire to acquire as a site for a public building, it would hardly be deemed essential for the latter state to obtain the consent of Congress before it could make a valid agreement with Virginia for the purchase of the land. If Massachusetts, in forwarding its exhibits to the World's Fair at Chicago, should desire to transport them a part of the distance over the Erie Canal, it would hardly be deemed essential for that State to obtain the consent of Congress before it could contract with New York for the transportation of the exhibit line of two States should cross some malarious through that State in that way. If the bordering and disease producing district, there could be no possible reason, on any conceivable public

> grounds, to obtain the consent of Congress for the bordering States to agree to unite in draining the district, and thus remove the cause of disease. So in case of threatened invasion of cholera, plague, or other causes of sickness and death, it would be the height of absurdity to hold that the threatened States could not unite in providing means to prevent and repel the invasion of the pestilence without obtaining the consent of Congress, which might not be at the time in session. If, then, the terms 'compact' or 'agreement' in the Constitution do not apply to every possible compact or agreement between one state and another, for the validity of which the consent of Congress must be obtained, to what compacts or agreements does the Constitution apply?
>
> "We can only reply by looking at the object of the constitutional provision and construing the terms 'agreement' and 'compact' by reference to it. It is a familiar rule in the construction of terms to apply to them the meaning naturally attaching to them from their context. *Noscitur a sociis* is a rule of construction applicable to all written instruments. Where any particular word is obscure or of doubtful meaning, taken by itself, its obscurity or doubts may be removed by reference to associated words. And the meaning of a term may be enlarged or restrained by reference to the object of the whole clause in which it is used.
>
> "*Looking at the clause in which the terms 'compact' or 'agreement' appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.* • • •"
>
> (Emphasis added.)

The court later discussed the relation of the compact

clause to boundary disputes in particular (148 U.S. 503 at 520):

> "* * * The compact or agreement will then be within the prohibition of the Constitution or without it, according as the *establishment of the boundary line may lead or not to the increase of the political power or influence of the states affected, and thus encroach or not upon the full and free exercise of Federal authority.* (Emphasis added)[4]

Shortly after the decision in *Virginia v. Tennessee, supra*, this Court in *Wharton v. Wise, supra*, 153 U.S. 154 (1894), was confronted with the question of the validity of a compact between Virginia and Maryland, entered into in 1785, under the Articles of Confederation. This compact dealt with the regulation of commerce, navigation and fishing, and the exercise of jurisdiction over the Potomac River.

Article VI of the Articles of Confederation had provided that no two or more states could enter into any treaty, confederation, or alliance without the consent of Congress. In determining that the compact between Virginia and Maryland was not one of the type which required such consent, the court quoted extensively from *Virginia v. Tennessee, supra*, and then concluded as follows:

> "So, in the present case, looking at the object evidently intended by the prohibition of the Articles of Confederation, we are clear they were not directed against agreements of the character expressed by the compact under consideration. Its execution could in no respect encroach

[4]The emphasized language was quoted by this Court in *New Hampshire v. Maine, supra*, at 426 U.S. 363.

> upon or weaken the general authority of Congress under those articles. * * *" (153 U.S. at 170)

Thus, while the *Virginia v. Tennessee* rule could be characterized as dicta, this court's reliance on that rule in deciding *Wharton v. Wise, supra*, and *New Hampshire v. Maine, supra*, established that rule as controlling law.[5] The *Virginia v. Tennessee* interpretation of the compact clause has been the guiding principle from which the courts have not deviated since in applying the compact clause, irrespective of the nature or subject matter of the compact under consideration.

Thus, interstate agreements in aid of state taxation have been held valid without congressional consent under the *Virginia v. Tennessee test.*

[5]And in fact, as stated by Engdahl, footnote 3, *supra*, at page 69: "* * * in every case since *Virginia v. Tennessee* in which an interstate arrangement has been challenged for lack of congressional consent, it has been held exempt from the consent requirement. * * *"

An excellent article analyzing the authorities pertaining to congressional consent is titled, "The Compact And Agreements of States With One Another and With Foreign Powers" and is contained in 2 Minn. L. Rev. 500-516. The author there concludes, in regard to the Compact Clause and comparable constitutional provisions:

> "If we consider the history of these constitutional provisions together with the other provisions of the constitution which grant or limit authority, we are led to conclude that only political compacts or agreements which affected their (the states) sovereignty as between themselves or between them and the federal government were sought to be regulated or controlled.
>
> "We realize that the support to be found for this proposition in the federal cases is largely dicta yet such dicta have been long standing and, so far as we can learn, have never been judicially criticized." (Material in parenthesis added, 2 Minn. L. Rev. 514.)

In "Desty's Federal Constitution," Second Edition (1879) at page 193, which predated *Virginia v. Tennessee, supra*, the author notes that the compact clause relates to agreements or compacts which are political. It is there stated:

> "Such agreement or compact as is in its nature political * * * cannot operate as a restriction upon the powers of Congress under the Constitution. The prohibition is political, * * *"

In *Dixie Wholesale Grocery Company v. Martin*, 278 Ky. 705, 129 S.W.2d 181 (1939), a wholesale grocer sought an injunction to restrain the commissioner of Kentucky from prosecuting it under the state's cigarette stamp tax act. The plaintiff made sales to customers located in Ohio as well as in Kentucky, and attacked a regulation issued by the Kentucky commissioner, which required all cigarette dealers claiming exemption under the resale provision of the law to file with their cigarette tax returns the names and addresses of their out-of-state (Ohio) consignees of unstamped, and hence untaxed, cigarettes. This regulation had been issued in order to carry out an agreement, authorized by legislation between the Kentucky and Ohio taxing authorities, under which each had agreed to furnish the other the names and addresses of purchasers of unstamped cigarettes shipped to the latter state. The Kentucky court rejected the attack on the agreement as invalid under the compact clause for lack of congressional consent under the principle established by *Virginia v. Tennessee* that:

> "* * * inhibition in this section only applies to political alliances which may encroach upon the supremacy of the United States. That opinion recites: 'There are many matters upon which different states may agree that can in no respect concern the United States'." (278 Ky. at 711, 129 S.W. 2d at 184)

This court denied certiorari, 308 U.S. 609 (1939).

Roberts Tobacco Co. v. Department of Revenue,

322 Mich. 519, 34 N.W. 2d 54 (1948) involved an agreement similar to that involved in *Dixie Wholesale Grocery v. Martin, supra.* In upholding the constitutionality of the agreement, the court relied upon the *Martin* case and *Virginia v. Tennessee.*

Bode v. Barrett, 412 Ill. 204, 106 N.E. 2d 521 (1952), involved an Illinois motor vehicle tax for highway use. The act contained a reciprocity provision, under which the secretary of state was authorized to enter into agreements with other states to exempt their residents from the Illinois tax if the other states extended like treatment to Illinois residents. In rejecting the contention that the Illinois act and agreements reached thereunder violated the compact clause, the court first discussed *Dixie Wholesale Grocery v. Martin, supra*, and *Virginia v. Tennessee, supra*, and then concluded:

> "Consideration of these and other pertinent authorities impels the conclusion that the Federal constitutional interdiction of 'interstate compacts' was written into the organic law of the land in order to protect a then nascent republic from such *ententes* among powerful States as would aggrandize their political power at the expense or the compromise of national sovereignty. *The provision does not inhibit those purely fiscal interstate agreements that facilitate interstate commerce and aid in execution of internal revenue policies. This is particularly true when such agreements conduce to, rather than restrain, commerce among the several states.*" (Emphasis added) (196 N.E. 2d at 536)

In affirming the decision of the Illinois Supreme Court, this court stated as follows:

"We need notice only one other argument and that is that the statute requires Illinois residents to pay the tax, whereas nonresidents are exempted provided the states of their residence reciprocate and grant like exemptions to Illinois residents. * * * *And contrary to appellants' suggestions, that kind of reciprocal arrangement between states has never been thought to violate the Compact Clause of Art I, § 10 of the Constitution.* See St. Louis & S.F.R. Co. v. James, 161 US 545, 562, 40 L ed 802, 808, 16 S Ct 621; Kane v. New Jersey, 242 US 160, 168, 61 L ed 222, 227, 37 S Ct 30." (*Bode v. Barrett*, 344 U.S. 583 at 586 (1953)) (Emphasis added)

Most directly in point, the Compact itself has been held valid by three other courts in addition to the court below by reliance on the *Virginia v. Tennessee* test against claims that it required congressional consent.

In *Kinnear, et al. v. The Hertz Corporation*, 86 Wn. 2d 407, 545 P.2d 1186 (1976), the Supreme Court of Washington unanimously upheld the Compact against the same constitutional arguments raised here by the Appellants. The analysis of the constitutional questions by the Washington Supreme Court was similar to that employed by the three-judge court below. Federal district courts in Idaho and North Dakota have also upheld the Compact.[6]

[6]In *Multistate Tax Commission, et al., Petitioner v. Sperry Rand Corporation*, Respondent, United States District Court for the District of Idaho, No. 1-75-168, by order dated October 26, 1976, the District Judge upheld the joint audit provisions of the Multistate Tax Compact here in question by granting Petitioners' motion for summary judgment. In *Dorgan, Petitioner v. International Business Machines Corp.*, Respondent, and *Dorgan, Petitioner v. International Harvester Co.*, Respondent, U.S. District Court for the District of North Dakota, Southwestern Division, Nos. A1-74-24 and A1-74-25, respectively, by order dated October 7, 1976, the District Court held that the Respondents were required to make their books and records available for audit by auditors of the Commission.

Other types of interstate agreements not directly relating to the power of taxation have also been ruled valid under the *Virginia v. Tennessee* test without congressional consent:

(1) *Ham v. Maine-New Hampshire Interstate Bridge Authority*, 92 N.H. 268, 30 A.2d 1 (1943), held that congressional consent was not required for a compact under which an interstate bridge authority was established;

(2) *State v. Doe*, 149 Conn. 216, 178 A.2d 271 (1962) held that congressional consent was not required concerning a Connecticut statute which authorized the state welfare commissioner to enter into reciprocal agreements with other states for interstate transportation of poor and indigent persons pursuant to the interstate compact on welfare services; and

(3) *Landes v. Landes*, 1 N.Y.2d 358, 135 N.E. 2d 562, 153 N.Y.S. 2d 14, appeal dismissed 352 U.S. 948 (1956) held that congressional consent was not required concerning the New York uniform support of dependents act and the California uniform reciprocal enforcement of support act.

Finally, in a decision which predated *Virginia v. Tennessee* and undoubtedly influenced that decision, the Georgia Supreme Court in *Union Branch R.R. v. E.T. & Ga. R.R. Co.*, 14 Ga. 327 (1853) held that a compact between Georgia and Tennessee, which authorized construction of a railroad in the

two states, did not require congressional consent. The court stated in *Union Branch*:

> "1. * * * in our opinion, this prohibition (the compact clause) applies only to such an 'agreement or compact' as is in its nature political; or more properly, perhaps, such as may, in any wise, conflict with the powers which the States, by the adoption of the Federal Constitution, have delegated to the General Government.
>
> * * * * *
>
> "The framers of the Constitution clearly intended nothing more by this clause, than to prohibit the several States from exercising their authority in any way which might limit, or infringe upon a full and complete execution by the General Government, of the power's intended to be delegated by the Federal Constitution; because nothing more was to be gained by any further prohibition, no further benefit to the General Government could have been derived from it, and it would have been entirely superfluous and unnecessary.
>
> "It was very proper and expedient, that no State should have been allowed to enter into any compact with another State or Foreign Government, which, by involving the exercise of powers parted with by the States, and belonging to the Federal Government, might operate seriously to embarrass that Government. But it could work no injury to the General Government, for such State to make an agreement with another State, or even a foreign power, which in no wise conflicted with the authority delegated to the General Government, and tended in no manner to embarrass that Government, in the full and complete exercise of its powers. Unless we take this view of the case, we must hold that a State, without the consent of Congress, can make no sort of contract, whatever, with another State." (14 Ga. 339-340)[7]

Not only have the courts followed the *Virginia v. Tennessee* test, but also Congress has followed this test in its debates over congressional consent to compacts or agreements between the states. This is illustrated by the debate as to whether or not the Southern Regional Educational Compact required congressional consent. It was contended on the floor of the Senate that congressional consent was not required under the test of *Virginia v. Tennessee, supra.*[8] The Compact was put into effect without congressional consent. In fact, the *Virginia v. Tennessee* test has been before Congress for a considerable number of years. A volume entitled, "Constitution of the United States of America, Revised and Annotated 1924" (Washington Government Printing Office 1924—68th Congress, 1st Session—Senate Document No. 154) which was distributed to each congressman as his "constitutional bible," laid down the following test at page 373:

> "Such an agreement or compact as is in its nature political, or which may conflict with the powers delegated to the general government * * * cannot operate as a restriction upon the powers of Congress under the Constitution." (Citing among other cases *Virginia v. Tennessee, supra*, and *Wharton v. Wise, supra.*)[9]

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[7] *Cf. Dover v. Portsmouth Bridge*, 17 N.H. 200 (1845); *Fisher v. Steele*, 39 La. Ann. 447, 1 So. 882 (1887); *McHenry County et al. v. Brady*, 37 N.D. 59, 163 N.W. 540 (1917).

[8] 94 Cong. Record 5560, 5561, 5563, 5570, 5676, 5677, 5759, 5766 (1948).

[9] A comparable test was set forth in the "Constitution of the United States of America" (Revised and Annotated 1938) U.S. Government Printing Office, Washington 1938—74th Congress, 2d Session, Senate Document No. 232 at pages 368-370. As there stated:

In resolving the question of congressional consent, then, it is clear that the only established test is that contained in *Virginia v. Tennessee, supra*, and that test is whether a compact tends to increase the political power in the states in a manner which may encroach upon or interfere with the just supremacy of the United States.

Notwithstanding the extensive history of the *Virginia v. Tennessee* test, including its affirmance and application in *Wharton v. Wise, supra*, and *New Hampshire v. Maine, supra*, Appellants assert that the test in *Virginia v. Tennessee* is not here controlling and that it is limited to boundary disputes (Appellants' Br., 32) or that it is dicta (Appellants' Br., 12, 35).

The compact clause had its origin in the very practical problems which plagued the colonies before adoption of the constitution and which continued to plague the new states. These problems were, quite simply, the continuing controversies between the colonies and later between the states, often over boundaries.[10] During the colonial period, such controversies were settled by the Privy Council. With the formation of the new nation, a new mechanism had to be found to resolve these controversies which, during the

"Any agreement or compact which tends to the increase of the political power of the States or which may conflict with the powers delegated to the General Government * * * cannot encroach upon or interfere with the supremacy of the Federal Government, and so far as inconsistent with the Constitution will be superceded by it."

This document was also distributed to each member of Congress as his "consitutional bible."

[10]For a general discussion of these controversies, and their relationship to the compact clause, see *Virginia v. West Virgina*, 246 U.S. 565 at 596-600 (1918).

period of the Articles of Confederation, had "brought the states to the very verge of physical struggle" and were jeopardizing the existence of the new nation.[11]

The solution embodied in the constitution was three-fold. As stated by this court:

> "* * * the conferring on this court of original jurisdiction over controversies between the States, the taking away of all authority as to war and armies from the States and granting it to Congress, the prohibiting the States also from making agreements or compacts with each other without the consent of Congress, at once makes clear how completely the past infirmities of power were in mind and were provided against." *Virginia v. West Virginia*, 246 U.S. at 599.

Disputes between states necessarily involve a conflict between one state's claims of sovereign power and those asserted by another state. The disputes might involve conflicting assertions of state power over a geographical area, as in a typical border dispute; or they might involve claims over a river system, as in *Arizona v. California*, 373 U.S. 546 (1963). But whatever the subject matter of the dispute, the resolution necessarily involves the claims of one state receding—voluntarily or involuntarily—to accommodate those of another.

Where an accommodation between conflicting claims is worked out in voluntary agreement between the states involved in the dispute, that agreement might "* * * tend to increase and build the political influence of the contracting States, so as to

[11]*Virginia v. West Virginia, supra*, 246 U.S. at 598.

encroach upon or impair the supremacy of the United States * * *" *Virginia v. Tennessee, supra*, 148 U.S. at 518. In such a case, the resolution of the dispute must receive congressional consent.

The Compact, in contrast, is addressed to a completely different sort of problem. It does not even purport to readjust conflicting claims between the sovereign powers of different states; rather it simply represents a decision of the member states to utilize a common advisory agency in the exercise of one of their undisputed powers, i.e., to tax businesses such as those of the Appellants.

This court, in *Virginia v. Tennessee*, clearly recognized the distinction between cooperative agreements, such as the Compact in question, which do not require congressional consent, and conflict-resolving agreements which might require consent. Thus, in *Virginia v. Tennessee*, this Court gave two examples of such cooperative agreements, each involving joint action to solve a common public health problem which did not require congressional consent. See 148 U.S. at 518. The Compact in question is conceptually no different.

Most importantly, this court in *Virginia v. Tennessee* recognized the need for flexibility in the states to enter into cooperative agreements for joint action, without congressional consent. It was recognition of this need which prompted the court to characterize a literal reading of the compact clause as "the height of absurdity," 148 U.S. at 518, and to set forth the test which has been used ever since.

By construing the compact clause in the light of its historical purpose, as set forth in *Virginia v. West Virginia, supra*, and *Virginia v. Tennessee, supra*, this Court will preserve the flexibility which is required by the states under modern conditions.[12] Past history and present realities converge, and lead to the same conclusion.

In a further effort to distinguish *Virginia v. Tennessee, supra; Wharton v. Wise, supra;* and *New Hampshire v. Maine, supra*, Appellants argue that these cases have no application if a Compact "might affect subjects placed under the control of Congress." (Appellants' Br., 33, quoting from *Wharton v. Wise, supra*, 153 U.S. at 171)

But that quote does not support the Appellants' argument. Rather, it supports the position of Appellees. As noted by Dunbar, "Interstate Compacts and Congressional Consent," 36 Va. L. Rev. 753, 757 (1950), the language quoted from *Wharton v. Wise* (opinion written by Justice Field who wrote the opinion in *Virginia v. Tennessee*), supports the proposition that the states, in the exercise of powers reserved to them under the Constitution, are not always required to obtain congressional consent to exercise those powers by "agreement or compact." Appellants fail to recognize that the states have a

[12]Should the Appellants be able to convince the Congress that the tax treatment they are receiving from one or more states, be they compact members or not, is not in the national interest, the Congress may well be empowered to take corrective action under the commerce clause. But if the states are to be constrained in their efforts to produce uniformity in state and local taxation of multistate businesses, it should be done by the Congress, as a matter of deliberate legislative choice, and not by this court as a matter of constitutional necessity.

reserved power to deal with the subject of state taxation of multistate businesses in the absence of congressional legislation prohibiting such state action so long as the states do not exercise power forbidden by the commerce clause of its own force or effect. The compact in *Wharton v. Wise, supra* dealt with navigation rights on interstate waterways and the carrying on of commerce between the compact states over those waterways (153 U.S. at 163, 164). Thus, the compact in *Wharton v. Wise, supra,* dealt with an area which was clearly subject, under the Constitution, to congressional regulation. Justice Fields' statement pertaining to compacts which "might affect subjects placed under the control of Congress" (*Wharton v. Wise, supra,* 153 U.S. at 171) necessarily related to an area of *exclusive* congressional power, i.e., an area in which the states have no power to act even in the absence of congressional action. Otherwise, the compact in *Wharton v. Wise* would have been of the type which required congressional consent under the Constitution. Therefore, Appellants' argument that any compact dealing with interstate commerce requires congressional consent is in error.[13] The only compacts requiring congressional

[13]The congressional consent compact cases referred to *supra* in this brief which were held valid without congressional consent dealt with the subject matter of interstate commerce. *Dixie Wholesale Grocery Company v. Martin, supra,* 278 Ky. 705, 129 S.W. 2d 181, and *Roberts Tobacco Co. v. Department of Rev.,* 322 Mich. 519, 34 N.W.2d 54 (1948), dealt with interstate transportation of cigarettes; *Bode v. Barrett, supra,* 412 Ill. 204, 106 N.E.2d 521 (1952), aff'd 344 U.S. 583 (1953), pertains to the interstate use of motor vehicles; *Ham v. Maine-New Hampshire Interstate Bridge Authority, supra,* 92 N.H.268, 30 A.2d 1 (1943), *Union Branch R.R. v. E.P. & Ga. R.R. Co., supra,* 14 Ga. 327 (1853), and *Dover v. Portsmouth Bridge, supra,* 17 N.H. 200 (1845), were concerned with interstate transportation facilities; and

consent then are those which deal with an area of exclusive federal authority or which affect the political balance among the states to the detriment of federal power."[14]

The distinction we are making here was expressly recognized and applied by this court in *St. Louis & S.F.R. Co. v. James,* 161 U.S. 545 (1896). Involved in that case was an agreement between two states relating to regulation of an interstate railroad. This court stated:

> "It is competent for a railroad corporation organized under the laws of one State, when authorized so to do by the consent of the State which created it, to accept authority from another State to extend its railroad into such State and to receive a grant of powers to own and control, by lease or purchase, railroads therein, and to subject itself to such rules and regulations as may be prescribed by the second State.

State v. Doe, supra, 149 Conn. 216, 178 A.2d 271 (1962), and *Landes v. Landes, supra,* 1 N.Y.2d 358, 135 N.E. 2d 562 (1953), N.Y.S.2d 14, appeal dismissed, 352 U.S. 948 (1956), dealt with the interstate movement of persons for welfare and support payment purposes. *McHenry County v. Brady, supra,* 37 N.D. 59, 163 N.W. 540 (1917), dealt with an agreement in regard to an international drainage district. *Fisher v. Steele, supra,* 39 La. Ann. 447, 1 So. 882 (1887) upheld an interstate agreement for construction of a levee along the Mississippi River.

[14]This critical distinction we here make was established by this court in the early case of *Cooley v. Board of Wardens of the Port of Philadelphia, et al.,* 53 U.S. (12 How.) 298, 13 L. Ed. 996 (1851). In *Cooley,* this court was confronted with the problem of whether or not the states had the power to regulate a subject of interstate commerce—port pilots—in light of the constitutional grant of power to Congress to regulate interstate commerce. This court held that the grant of power to Congress to regulate interstate commerce did not of its own force and effect deprive the states of power over interstate commerce. In upholding the power of the states to regulate port pilots in a manner affecting interstate commerce, this court concluded:

> "We are of opinion that this state law was enacted by virtue of a power, residing in the State to legislate; * * *" (13 L. Ed. 1006)

Numerous decisions of this court hold that, within this court's guidelines and absent conflicting federal legislation, state taxation of multistate businesses is not a regulation of commerce within the purview of the commerce clause. *Northwest States Portland Cement Co. v. Minnesota,* 358 U.S. 450 (1959). (See also *infra* pgs. 46-50)

> Such legislation on the part of two or more States is not, *in the absence of inhibitory legislation by Congress*, regarded as within the constitutional prohibition of agreements or compacts between States." (Emphasis added) (161 U.S. 562)

Congress clearly had the power to pass "inhibitory legislation," for the subject matter of the legislation was an interstate railroad and interstate commerce. But until Congress did so, the states were free from the restrictions of the compact clause, and could work out a regulatory scheme of their own.

Thus, the history of the compact clause and the basic purpose for its inclusion in the Constitution of the United States dictates that the *Virginia v. Tennessee* test is controlling here.

B. **The Compact does not increase the political power of the states or encroach upon the just supremacy of the United States.**

The Compact leaves completely intact the individual member states' power over its sole subject matter, that of state and local taxes of multistate businesses. As found by the court below:

> "Applying the test of *Virginia v. Tennessee* and *New Hampshire v. Maine*, *supra*, to the Compact here in issue, the Multistate Tax Compact does not increase the political power of the party states. The Commission is vested with no taxing authority; the taxes which it administers are only those imposed by the respective states and subdivisions in accordance with state law.
>
> "Nor does the Commission have legislative power; it may propose model regulations where two or more party states or their subdivisions

> have uniform or similar laws. Such proposals may be adopted, modified, or rejected by the duly authorized tax officials of the affected states.[6] ([6]Proposing model uniform legislation is a function performed by such organizations as the National Conference of Commissioners on Uniform State Laws, bar organizations and public interest groups. As with the proposals of such groups, the recommendation of the Commission may be persuasive, but the decision whether to enact the recommended legislation or regulations lies solely with those officials designated by each state's constitution and laws.)
>
> "The Commission does have the power to conduct audits, but only at the request of a party state or its subdivision. In aid of this power, the Commission is authorized to seek the compulsory process of courts having jurisdiction within the party states. The Commission does not have the authority to enforce any tax liability; that, too remains within the jurisdiction of the respective taxing authorities. Any grievance that a taxpayer may have with the results of a Commission audit or the tax liability resulting therefrom is justiciable in the taxing state in accordance with the same procedures governing the grievances of intrastate taxpayers.
>
> * * * * *
>
> "The member states have ceded no sovereignty over tax matters to the Commission." (Jur. St. App. A, 11a-12a, 14a)

The Compact does not encroach upon or interfere with any federal power, including the power to regulate interstate commerce.

As also stated by the District Court below:

> "Similarly, it is clear that the Compact does not encroach upon or interfere with federal supremacy. Although Congress may be constitutionally empowered by the Commerce Clause, Article I,

§ 8, clause 3, to legislate and regulate the interstate administration of state tax systems, Congress has yet to exercise this power. Plainly, this failure to act has not preempted the states' powers in the field of multistate tax administration. Since the states may act individually in this area, there is no greater encroachment upon the federal interest by their acting cooperatively. Notwithstanding this Compact, Congress could enact comprehensive legislation that would preempt the power.

"In *Virginia v. Tennessee*, *supra*, at 518, the Court observed that '(t)here are many matters upon which different states may agree that can in no respect concern the United States.' Although the problems of multistate tax administration might be a concern of federal interest, that concern has not been evidenced by legislation in this area. As yet, there are no federal statutes or expressed Congressional policies with which this Compact could interfere. In the event of federal preemption in the future, dependants must withdraw *pro tanto* in order that any such federal statute shall be supreme." (Jur. St., App. A, 12a)

Under the Compact, the member states administer their own tax laws and do not delegate any of their authority to anyone. Each state, independent of the Compact, has the power to adopt uniform legislation, to audit Appellants' books and records on its individual account, to grant multistate taxpayers certain options in the determination of their tax liability, and to enter into reciprocal joint audit agreements with other states. By adoption of the Compact, each state has retained complete and absolute control over its own tax system. Furthermore, each state

has the inherent power to delegate audit responsibilities to a third party (Jur. St. App. A, 11a-12a).

The attempt by the legislatures of the member states to improve tax administration by creating the Commission as a purely advisory and recommendatory agency could not possibly alter the political balance among the states or between the states and the federal government.

Thus, the Compact and the implementation of its joint audit provisions are fully within the power and domain of the states. These provisions in no way shift political power among the states or encroach upon or interfere with the federal supremacy. Consequently, congressional consent is not required for their implementation. The federal government and the individual states retain the same power and the same supremacy with the Compact in force as they have without the Compact.

In sum, based upon the provisions of the Compact and their operative effect and based upon the uniform decisions of this court including *Virginia v. Tennessee*, *supra*, and *New Hampshire v. Maine*, *supra*, it is clear that the Compact does not require congressional consent for its validity.

In fact, there is a serious question as to whether the Compact is an "agreement or compact." The fact that it is called a compact is not controlling. As indicated in a comment entitled, "What Did the Framers of the Federal Constitution Mean By

'Agreements or Compacts'?" 3 U. Chi. L. Rev. 453 (1936), there is no reliable history in the constitutional convention proceedings or otherwise to indicate what was to be encompassed by the term "agreement" or "compact" as used in Article I, § 10, clause 3 of the Constitution of the United States. Clearly, the Compact in question does not impose any binding agreement on any state. Any state is free to join or withdraw from the Compact at will, as exemplified by the withdrawal of Illinois. The operative provisions of the Compact are merely reciprocal arrangements among the party states for their mutual benefit in administering their state tax laws as applied to multistate-multinational businesses.

While it is true that the advisory and recommendatory functions of the Compact are carried on through a Commission and the Compact is supported by legislation in the member states, the functions of the Commission could be just as well discharged by the tax administrators of the member states on an ad hoc basis without any formal agreement whatsoever. They certainly could provide for advisory regulations in the interpretation of uniform law such as that contained in UDITPA without any "compact" or "agreement" whatsoever.

Likewise, the states could enact the uniform legislation contained in the Compact and provide for joint audits of multistate taxpayers without the necessity for a "compact" or "agreement." This Court in *Bode v. Barrett, supra*, 344 U.S. 583, 586

(1953) noted that, "* * * reciprocal arrangement between states has never been thought to violate the Compact Clause. * * *" Basically, this is at most all the Compact consists of. Its only added feature is cooperative administration of uniform state legislation which has never been hinted as constituting a binding compact or agreement by the states participating in such cooperative administrative action. Member states can act totally independent of the work and administration of the Compact by the Commission. They can participate as joint administrators in promulgating advisory regulations or in joint audits and completely ignore the results. In no manner or means is any action by the Commission binding in any way on any member state.

Under these facts, which cannot here be disputed, it is difficult to perceive the Compact in question as the kind of arrangement that is a "compact" or "agreement" within the intent of Article I, § 10, clause 3 of the United States Constitution. Certainly, this clause must refer to an arrangement, contractual in nature, that has some binding effect or contains binding obligations on the participants. Thus, the *Bode v. Barrett* test, wherein the court has held that reciprocal legislation is exempt from the congressional consent requirement of Article I, § 10, clause 3, is precedent for holding that the Compact in question does not require congressional consent.

In fact, reciprocal legislation, such as that up-

held in *Bode v. Barrett* is more obligatory on the states participating in such legislation than is the Compact.

II

THE MULTISTATE TAX COMPACT DOES NOT ENCROACH UPON FEDERAL SUPREMACY IN THE AREA OF INTERSTATE COMMERCE BECAUSE IT DEALS WITH A SUBJECT MATTER LEFT EXCLUSIVELY TO THE DOMAIN OF THE STATES ABSENT ANY CONFLICTING FEDERAL LEGISLATION.

In the absence of congressional legislation on the subject, the states are free to impose their taxes on multistate businesses within the guidelines laid down by this Court. (*Cooley v. Board of Wardens of the Port of Philadelphia, et al., supra*, 53 U.S. (12 How.) 298, 13 L. Ed. 996 (1851). This Court has issued many decisions upholding the validity of state taxes imposed on multistate businesses against the claim that those taxes violate the Commerce Clause. All of those decisions refute Appellants' contention that the Compact is invalid because it deals with interstate commerce; and indeed, directly or indirectly, any tax (including property taxes) to some extent affects interstate commerce.

The fact that a business activity is the subject of regulation by the Congress does not preclude state taxation. As stated in *Polish National Alliance v.*

National Labor Relations Board, 322 U.S. 643, 649 (1944):

> "* * * federal regulation does not preclude state taxation and state taxation does not preclude federal regulation."

This principle was reaffirmed in *Federal Power v. Union Electric Company*, 381 U.S. 90 (1965), Footnote 7, in the following context:

> "Utah Power & Light Co. v. Pfost, 286 US 165, cited by the Court of Appeals, is not opposed. The Court there held that a State had power to impose a tax on a company generating electric energy for distribution in interstate commerce. This, of course, does not control the commerce powers of Congress. Cf Edison Co. v. Labor Board, 305 US 197; Polish Alliance v. Labor Board, 322 US 643, 649: '(F)ederal regulation does not preclude state taxation and state taxation does not preclude federal regulation.'" (381 US 95)

This Court has specifically held that state taxation of multistate businesses is not a regulation of interstate commerce. *Portland Cement Co. v. Minnesota and Williams v. Stockham Valves & Fittings, Inc., supra*, 358 US 450 (1959). In upholding the income taxes there under attack as applied to interstate businesses, the court noted that the taxes "* * * are not regulations [of interstate commerce] in any sense of that term" (bracket material interpolated) 358 US 461. In fact, the grant of power to Congress by the commerce clause to regulate interstate commerce does not withdraw from the states the authority to regulate such commerce with respect to matters

of local concern on which Congress has not spoken. *Parker v. Brown*, 317 US 341, 360 (1942).

If the states lack power to legislate in the area of state and local taxation of businesses engaged in interstate commerce except as permitted by Congress, all state and local taxation of Appellants and the class they purport to represent would be invalid. Thus, cases like the recent case of *Colonial Pipeline Co. v. Traigle, Collector of Revenue of Louisiana*, 421 U.S. 100 (1975) and *Complete Auto Transit, Inc. v. Brady*, ... U.S. ....., 51 L. Ed 2d 326, 97 S. Ct. 1076 (1977) would have been improperly decided.

In no sense can the advisory powers granted the Commission be construed as an unconstitutional regulation of interstate commerce. In specific reference to the controversy here, an audit in aid of the enforcement of a tax is no more a regulation of interstate commerce than the tax itself. Furthermore, a joint audit is no more a regulation of interstate commerce than individual audits by the states participating in the joint audit.

The District Court properly analyzes the commerce clause argument of Appellants as follows:

> "Plaintiffs next contend that the Compact violates the Commerce Clause in several respects. Plaintiffs' first contention in this regard is that Congress, under its power to regulate interstate commerce, has preempted the field. As we noted previously regarding the issue of encroachment upon federal supremacy, there has been no such federal preemption. It is now established that

> '* * * federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained.' *Florida Lima & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

"See also *Merrill Lynch, & c. v. Ware*, 414 U.S. 117, 139 (1973). There is nothing inherent in the problems of multistate tax administration that would require federal regulation, nor has Congress yet identified these problems as a matter of peculiar federal concern.

"Second, plaintiffs contend that the Compact imposes an undue and unreasonable burden upon interstate commerce.

> 'It is a truism that the mere act of carrying on business in interstate commerce does not exempt a corporation from state taxation. "It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business." *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938).' *Colonial Pipeline Co. v. Traigle*, 421 U.S. 100, 108 (1975).

"Indeed, plaintiffs do not contend that the Commerce Clause bars imposition of the respective state taxes which the Commission is charged with administering for the benefit of member states. A necessary correlative of the power to impose taxes is the power to audit, and determine the tax liability properly for each taxpayer.

"The stated purposes of this Compact,

supra, are to promote uniformity among state tax systems, ease taxpayer compliance and minimize the risk of duplicative taxation of the multistate taxpayer. Plaintiffs contend that the Compact promotes disparity, not uniformity. In support of this contention, plaintiffs argue that the voluntary nature of Compact membership and the fact that only twenty-one states have joined necessarily limits its reach. Plaintiffs further argue that the advisory powers granted to the Commission are insufficient to override the differences in the substantive tax laws of the party states. *Plaintiffs' characterization here of a compact binding only a loose and powerless confederation stands in sharp contrast to their simultaneous characterization of the Compact as intruding upon the federal supremacy and increasing the political power of the states.* That the Compact may promise more than it has as yet achieved is no ground for finding unconstitutionality. The member states have ceded no sovereignty over tax matters to the Commission. The fact that the Compact might promote a consensus among party states on principles of allocation of revenues or other matters, does not create an impermissible burden upon interstate commerce. This is so for at least two reasons: first, even without the Compact, the states could enact parallel or uniform tax legislation, as has been done with UDITPA itself; and second, any agreement between two or more states to observe an identical principle of state tax law diminishes the existing possibility of fifty disparate state tax results. In sum, we find no merit to the contention that the Compact is an unconstitutional burden upon interstate commerce." (Emphasis added) (Jur. St. App. A. 13a-15a)

III

THE COMPACT IS NOT INVALID WITHIN THE PURVIEW OF THE COMMERCE, EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE UNITED STATES CONSTITUTION BECAUSE THE COMPACT DOES NOT UNREASONABLY BURDEN INTERSTATE COMMERCE OR UNCONSTITUTIONALLY DISCRIMINATE AGAINST MULTISTATE TAXPAYERS.

The interstate commerce and Fourteenth Amendment (equal protection and due process) arguments of Appellants have been thoroughly demolished by the opinion below.[15] (Jur. St. App. A 13a-20a) We believe that this opinion is so persuasive as to require little further argument.

Assuming, arguendo, that there are differences in the standards applicable to multistate taxpayers under the Compact and applicable to intrastate taxpayers under member state laws, various principles of constitutional law prevent Appellants from successfully relying on those differences to invalidate the Compact.[16]

Appellants must establish that the alleged differences are significant and result in an actual or threatened injury which denies them constitutional rights.

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[15]For all practical purposes, these arguments have been abandoned on this appeal. Clearly, the Compact should not be declared invalid under the commerce clause or Fourteenth Amendment because of alleged abuse by its executive director in his advisory role to the Commission and member states. (Appellants' Brief, 48-51)

[16]The lower court specifically held: "The different treatment, if any, accorded multistate taxpayers by the Compact is a permissible legislative response to what is perceived as the different circumstances of the multistate taxpayer." (Jur. St. App. A 20a)

Re 620 Church Street Building Corp., 299 U.S. 24, 27 (1936); *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531, 544, 545 (1914). *General Trading Co. v. State Tax Commission*, 322 U.S. 335, 338 (1944). A distinction in form is not sufficient. *Gregg Dyeing Co. v. Query*, 286 U.S. 472 (1932).

This court has upheld a variety of differences between state taxes as they pertain to multistate business as compared to intrastate businesses against the argument that these differences deny multistate businesses constitutionally protected rights. Appellees are aware of no decision of this court that has even hinted that administrative differences in determining the tax liability of multistate businesses, as compared to intrastate businesses, violate any federal constitutional rights of multistate businesses.

In *Henneford v. Silas-Mason Co.*, 300 U.S. 577 (1937), and in *Nelson v. Sears Roebuck & Co.*, 312 U.S. 359 (1941) this court noted that the methods used to collect taxes imposed upon multistate businesses there involved were different from those used to collect taxes imposed upon intrastate businesses. These differences were deemed immaterial by the court.[17] There is thus nothing in the commerce clause discrimination cases that would lend support to the

[17]In fact, this court has upheld tax statutes as nondiscriminatory as to interstate businesses so long as comparable taxes are imposed somewhere along the tax chain on intrastate businesses. *Hinson v. Lott*, 75 U.S. 148 (1869); *Gregg Dyeing Co. v. Query, supra*; *Henneford v. Silas-Mason Co., supra*; *Alaska v. Artic Maid*, 366 U.S. 199 (1961); *General American Tank Car Corp. v. Day*, 270 U.S. 367 (1926); *Cashey Baking Co. v. Virginia*, 313 U.S. 117 (1941); *Nelson v. Sears Roebuck & Co., supra*. In fact, the identical tax burden is not required to be placed on interstate businesses as compared to intrastate businesses. *General American Tank Car Corp. v. Day, supra*; *Alaska v. Artic Maid, supra*.

argument that the differences between the Compact standards in relation to multistate taxpayers and member state standards in relation to intrastate taxpayers are significant under the commerce clause.

In order for Appellants to establish that the compact denies them equal protection or due process of the law, they must establish that multistate taxpayers cannot be classified differently from intrastate taxpayers. However, such classification is permissible unless it is arbitrary and capricious; and unless no imagined set of facts would justify the classification. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973); *Madden v. Kentucky*, 309 U.S. 83 (1939); *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959).

Multistate businesses, by the very nature of their activities within a particular state, must of necessity be treated differently than purely local businesses. The problems involved in auditing a multistate-multinational corporation with national and international operations are vastly different from those involved in auditing the local grocery store. This alone disposes of the argument that the compact denies Appellants equal protection or due process of law. The differences applicable to intrastate taxpayers as compared to interstate taxpayers are based on a reasonable classification. The reason is that they rest on "some ground of difference having a fair and substantial relation to the object of the legislation." (*Stebbins v. Riley*, 268 U.S. 137, 142 (1925))

The important consideration here is that under the compact multistate taxpayers and intrastate taxpayers retain the same substantive rights concerning state and local taxation. *Metropolitan Co. v. Brownell*, 294 U.S. 580 (1935); *American Motors Insurance Co. v. Starnes*, 425 U.S. 637 (1976). There is no claim here that they have not.

In sum, as found by the three-judge court below, the Appellants' commerce clause, due process clause and equal protection clause arguments are totally lacking in merit.

IV
FURTHER ANSWERING APPELLANTS' POINTS

A. Introduction

We have shown above:

1. The rule of *Virginia v. Tennessee* is not dictum but is the law of this land as ruled in *New Hampshire v. Maine*. (*Supra*, pp. 21-22)

2. The rule of *Virginia v. Tennessee* applies to any and all agreements between the several states and not just to boundary agreements. (*Supra*, pp. 27-40)

3. The rule of *Virginia v. Tennessee* requires that Appellants demonstrate that the agreement tends to increase the political power of the combining states and encroaches upon or interferes with the just supremacy of the United States. (*Supra*, pp. 20, 25)

4. Appellants have made no such showing and

indeed the contrary is true; the Compact at bar does not increase the political or any other power of any or all of the member states and there is no encroachment upon or interference with any supremacy, just or otherwise, of the United States. (*Supra*, pp. 3-5, 40-46)

5. The Compact does not in any wise interfere with or impede interstate commerce and involves local taxation only in areas left exclusively to the respective states. (*Supra*, pp. 46-50)

6. The Compact does not in any wise deny equal protection or due process to Appellants or anyone else, nor does it burden, unreasonably or otherwise, interstate commerce. (*Supra*, pp. 51-54)

The Appellants have abandoned any effort to convince this Court that any provision of the Compact on its face requires congressional consent for its validity. They rely instead on what they represent as facts concerning its administration. Appellants have also abandoned any effort to show that this purported administration of the Compact requires congressional consent because it increases the political power of the states or because it encroaches upon federal supremacy. Rather, the Appellants contend that if the administration of the Compact has some effect on or interference with the interest of the nation or nonmember states, it requires congressional consent and that it is up to Congress to determine this (Appellants' Br. 12, 34, 35). Appellants then argue by reference to matters completely without the record and by broad sweeping conclusions, not

supported by any authority and contrary to fact, that the Compact is a regional effort of the western states and that its administration interferes with the interest of nonmember states and the federal government (Appellants' Br. 11, 35-47).

They center this argument on what they purport to be the rules and practices of the Commission in regard to "combined reporting" and "full apportionment of nonbusiness income" (Appellants' Br. 25-28, 35-46). Since neither the Compact nor the rules and practices of the Commission provide for "combined reporting" or "full apportionment of nonbusiness income" and since the Commission has no power to fix or determine any tax liability of any multistate taxpayer or any policy for any state, this argument is (a) irrelevant, and (b) lacks any foundation in law or fact. The Commission simply does not have any power to affect or interfere with the interest of the nation or nonmember states.

Similarly, a great deal of the Appellants' Brief consists solely of argument intended to discredit the Compact, the Commission and its work in the eyes of this Court. They assert that:

> "The adoption of rules or practices which conflict with the laws of the member states appears to be a recurrent custom of the Commission." (Appellants' Br. 29)

This argument, too, is (a) irrelevant and (b) lacks any foundation in law or fact. It is irrelevant because administration of the Compact is not at issue; and it lacks any possible factual or legal

foundation because the rules and practices of the Commission are not binding on any state and therefore could not conflict with the law of any state. The Commission simply has no power to fix or determine the tax liability of any multistate taxpayer. Not surprisingly, Appellants have not cited a single case in which the rules and practices of the Commission have been found to be violative of state law.

These introductory comments are intended to apprise the Court of the irrelevancy and lack of any possible factual or legal foundation for most of Appellants' argument. In constitutional cases, such as this, this Court has consistently rejected unsupported assertions of fact and hypothetical arguments to invalidate state laws under the Constitution of the United States. *General Motors Corp. v. Washington*, 377 U.S. 436 (1964).[18] It should do so in the instant case.

Though the Appellants' argument is wholly irrelevant in determining the validity of the Compact on its face, we do wish to point out, however, some serious misstatements and arguments of Appellants.

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[18]The District Court below placed Appellants' argument here in the appropriate context as follows:

> "No contention is made that the Compact is being administered other than according to its terms, except as to particulars governed by the substantive tax law of the respective party states. The constitutional issues posed by this complaint reduce themselves to questions of law.
>
> "Certain of the issues of fact which Plaintiffs would seek to raise are purely hypothetical and speculative. As to these issues, Plaintiffs have not 'set forth specific facts showing there is a genuine issue for trial' Rule 56(a) F.R.Civ.P. Certain other claimed issues of fact are plainly not material to the determination of the merits of the constitutional arguments raised here, although they may be of academic interest 'to the various states in determining whether to join or continue membership in the Compact." (Jur. St. App. A. 3a)

B. **In arguing that the Compact requires congressional consent, the Appellants ignore the test laid down in Virginia v. Tennessee, supra, as affirmed by this court in Wharton v. Wise, supra, and New Hampshire v. Maine, supra, and contrary to those cases assert that all modern compacts require congressional consent which assertion would result in an unwarranted shift of power to Congress.**

Appellants in substance are arguing that all compacts or agreements among the states which deal with subject matters of general interest require congressional consent (Appellants' Br. 12, 19-20, 32-35). In the Appellants' view, it is immaterial that a compact or agreement is purely an advisory arrangement and deals solely with administrative matters pertaining to a subject of direct concern only to member states and pertaining solely to powers reserved to the member states under the Constitution of the United States. Thus, Appellants argue that all interstate arrangements of the states, however informal and advisory, require a shift of political power from the states to the Congress.

Appellants' construction of the compact clause would have far-reaching effect and would be destructive of any kind of cooperative effort by the states to produce uniformity and to prevent avoidance of just taxes by multistate taxpayers. This is particularly so when it is realized that a compact or agreement within the purview of the compact clause need not be reduced to writing or constitute a formal ar-

rangement among the states (*Holmes v. Jennison, et al.*, supra, 39 U.S. (14 Pet.) 540 (1840)), and when it is realized, as indicated at length in the Appellants' Brief, that Congress does not play a passive role in giving its consent to a compact or agreement among the states. In the case at bar, Appellants are saying that the tax administrators of the member states of the Compact cannot confer together concerning common problems, agree on joint audits of multistate-multinational taxpayers and issue recommendations in the form of advisory rules and regulations without the control and consent of Congress. Thus, according to Appellants' view, each state must "go it alone" in resolving problems of state and local taxation of multistate businesses or they must deal with these problems as they arise from time to time only after receiving congressional consent. Certainly, this could not be the intent of the constitutional restraint on compacts.

Twenty-four states under the auspices of the Commission have entered into reciprocal exchange agreements for the exchange of information concerning taxpayers.[19] Under the Appellants' view of the compact clause, this agreement standing alone would require congressional consent. If several states should agree that they would conduct cooperative (joint) audits of selected multistate taxpayers, Appellants would require that such agreement be given congressional approval and that Congress could prescribe the

[19]Ninth Annual Report of the Multistate Tax Commission (1976), Appendix B, pp. 24-25.

rules or guidelines for such audits. On March 8, 1977, the Executive Officer of the Franchise Tax Board of the State of California, Mr. Martin Huff, and the Director of the Oregon Department of Revenue, Mr. John Lobdell, entered into just such an agreement. Since both California and Oregon follow the unitary concept and worldwide combination in imposing taxes on or measured by net income, Appellants argue that Congress could prevent them from doing so in reference to any joint audit pursuant to such an agreement, although each state individually could do so. This is of course what Appellants are arguing in regard to the joint audit program of the Commission.

Under Appellants' reasoning, the National Association of Tax Administrators could not function without congressional consent. This organization has a permanent staff. It is financed by the member states; and from time to time recommends that the states take particular actions in regard to any subject of general concern involving state and local taxation. A committee of this organization proposed uniform regulations for the Uniform Division of Income for Tax Purposes Act. At the Forty-Fourth and Forty-Fifth Annual Meeting of the National Association of Tax Administrators, the status of the United States-United Kingdom Income Tax Treaty and congressional foreign source income proposals were discussed and were a subject matter of resolutions by that body at those meetings. These resolutions oppose the proposed treaty limitations on state taxing power. Under Appellants' reasoning, any such con-

certed action by state tax administrators would be characterized as interference with foreign commerce and therefore invalid because it has not been recommended by an interstate agency which has received the consent of Congress.

In the tax field alone, there are numerous organizations of the states which deal with the same subject matters that are dealt with by the Commission. These organizations discuss common interstate taxation problems and propose rules and regulations or legislative action for their solution. They have at least as great or greater potential impact on federal policies or the interest of nonmember states as does the Commission. Yet, their constitutional validity has never been challenged.

The unwarranted and far-reaching effect of Appellants' construction of the Compact Clause lends validity to the test of *Virginia v. Tennessee*, *supra*, and the recent affirmance of that test in *New Hampshire v. Maine*, *supra*, to resolve the question of when congressional consent is require for any agreement or compact among the states.

C. Appellants erroneously contend that the Compact is a regional effort which interferes with the national interest and the interests of nonmember states. (Appellants' Br. 35-47).

Assuming, arguendo, that this Court were to abandon the *Virginia v. Tennessee*, *supra*, test and require congressional consent for compacts which,

in the Appellants' words, "interfere" with the national interest or the sovereignty (i.e. tax policies) of nonmember states, it is clear that the Compact does not so "interfere."

Appellants argue that the Compact interferes with the conduct of foreign affairs (Appellants' Br. 32-42) because "combined reporting" which is utilized for the purposes of state taxation by some states is not utilized by the federal government for federal income tax purposes. Since no provision of the Compact requires "combined reporting," this argument of Appellant lacks any factual or legal foundation.

Next, Appellants argue that the Compact has a serious impact on interstate commerce (Appellants' Br. 42-44) because "combined reporting" ("unitary business") and the apportionment of non-business income may result in multiple taxation and in increased costs of compliance. Since the Compact does not require combined reporting and since Article IV of the Compact specifically provides for the allocation of nonbusiness income, this argument of Appellants likewise lacks legal or factual foundation.

Appellants then argue that the Compact interferes with the sovereignty and revenue policies of the nonmember states (Appellants' Br. 45-47) because "combined reporting" and the apportionment of nonbusiness income deprives nonmember states of their ability to offer tax incentives to selected businesses. Since Article IV of the Compact specifically provides for the allocation of nonbusiness income and the Compact does not require combined reporting, this

argument also lacks any legal or factual foundation.

The foregoing illustrates the complete fallacy of the Appellants' argument that the *Compact* interferes with the national interest or the interest of the nonmember states. The most serious defect in Appellants' argument is the gap between what the Compact provides for in accordance with its terms and what the Appellants attribute to the Compact. The only provision of the Compact which has any bearing on Appellants' argument is Article IV which contains the Uniform Division of Income for Tax Purposes Act. Where any state adopts this Act, whether or not a member of the Compact, its adoption would have no effect on foreign affairs and no adverse impact on interstate commerce or the tax policies of nonmember states which Appellants erroneously attribute to the Compact. Therefore, it is not the Compact itself which is the subject matter of Appellants' complaints, but rather, UDITPA.

Though wholly irrelevant, we will now turn to a more detailed analysis of the specific elements of the Appellants' argument.

1. **Appellants' assertion that the Compact is a regional effort of the western states which conflicts with the interests of nonmember states is not in accordance with the history of the Compact.**

The Appellants assert that the Compact is a regional effort of the western states which adversely affects the interests of nonmember states. This argument is contrary to the history of the Compact and ignores the fact that a majority of the states are

either regular or associate members of the Compact. In addition to its regular members, the Compact has thirteen associate members consisting of the states of Alabama, Arizona, Georgia, Louisiana, Maryland, Massachusetts, Minnesota, New Jersey, Ohio, Oklahoma, Pennsylvania, Tennessee and West Virginia.[20]

An examination of the history of the Compact reveals that it was and is an effort by *all* the states to produce greater uniformity, certainty and equity and ease of compliance burdens in state and local taxation of multistate taxpayers.[21]

This Court should thus reject the Appellants' assertion that the Compact is a regional effort of some tax administrators which has a detrimental impact on nonmember states. All of the states participated in its formation and agree with its fundamental purposes of achieving greater uniformity, certainty, ease of compliance and equity in state and local taxation of multistate businesses. There is absolutely no provision of the Compact that has a regional bias. Once the constitutionality of the Compact is firmly established by this Court, it is anticipated that many nonmember states will become members. It is to their interest and the interest of the Nation for them to do so.

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[20]Ninth Annual Report of the Commission (1976), pp. XIV-XVI. Associate membership has been by designation of the governors of the associate member states and entitles the states to full participation in the activities of the Commission except voting and officer privileges.

[21]First Annual Report of the Commission (1968), pp. 1-2; Revenue Administration, National Association of Tax Administrators, Thirty-Fourth Annual Conference, Chicago, Illinois (1966), pp. 15-20; P.H. State and Local Taxes; All States Unit, para. 5100.

2. The Appellants erroneously argue that the Commission has issued invalid regulations calling for full apportionment of nonbusiness income of multistate-multinational taxpayers, contrary to state law and traditional practices. (Appellants' Br. 13, 26-27, 46,48)

While not material in determining the validity of the Compact on its face and the need for congressional consent, Appellants place in issue the validity of the Commission regulations pertaining to the Uniform Division of Income for Tax Purposes Act (Article IV of the Compact) and contend that these regulations are not in accordance with law and alter traditional patterns of taxing income from intangible properties by the state of commercial domicile (Appellants' Br. 13, 26-27, 46).

The Appellants' argument that the Commission regulations require full apportionment of nonbusiness income is defective for at least four reasons: (1) it is totally irrelevant and immaterial; (2) if the regulations are invalid and are adopted by any state, the Appellants and other multistate taxpayers have adequate remedies under state law to prevent the application of these regulations to them; (3) the regulations do not provide for apportionment of nonbusiness income; and (4) traditional practice has not been to assign all income from intangibles to the commercial domicile of the taxpayer.

Appellants' assertion that all income from intangible properties has traditionally been allocated to the commercial domicile for state income tax

purposes (Appellants' Br. 26) is refuted by the "Willis Report." Volume 1 of that Report,[22] pages 197-232, deals with the problem of specific allocation of income and deductions therefrom by state practices at the time of the Report. The report noted on page 198:

> "On the basis of the methods which they used to determine what income is specifically allocable, the States may be divided into three groups: (a) those which rely solely on an itemization of the particular types of income to be specifically allocated; (b) those which distinguish between business income and nonbusiness income; and (c) those which distinguish between unitary business income and other income."[23]

In an Indiana survey,[24] in answer to the question, "Does your state (ever) include dividends in the apportionment base?" 31 states answered "yes."

Interestingly, the Willis Report indicates:

> "* * * it should be noted that New York also distinguishes between 'business income' and 'investment income.' However, in New York 'investment income' is not specifically allocated but is apportioned by a formula based upon the amount of investment capital employed in that

[22]Report of the Special Subcommittee on State Taxation of Interstate Commerce of the Committee on the Judiciary House of Representatives, 88th Cong., 2nd Sess., HR 1480 (1964).

[23]Because of the wide variety of practices and inconsistencies in the specific allocation of items of income, including those from intangible properties, and because of the problems associated with determining the deductions from income attributable to specifically allocated income items, the Willis Subcommittee recommended full apportionment of all income. (The Report of the Special Subcommittee on State Taxation of Interstate Commerce of the Committee on the Judiciary House of Representatives, House Report No. 952, 89th Cong., 1st Sess., p. 1144)

[24]The State of Indiana conducted a survey to determine state progress toward uniformity. It published the results in a report entitled, "Results of a Survey of the Uniformity of State Tax Laws by the State of Indiana," dated February 15, 1977. This report is referred to several times in this brief and is reproduced as Supplement A to this brief.

> State." (Vol. 1 of the "Willis Report," 88th Cong., 2nd Sess., HR 1480 (1964), p. 199)[25]

Appellants further erroneously conclude that the Commission regulations do not provide for the apportionment of nonbusiness income.[26]

[25]Case authority also supports the proposition that income from intangible properties have been apportioned as part of unitary or business income. See *International Harvester v. Department of Tax.*, 322 U.S. 435 (1944), and *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435 (1940) (upholding the apportionment of income from dividends against the payor corporation based on its in-state activities); *Appeal of U.S. Steel Corp.*, Appeal No. 73-I-20 (Idaho B.T.A. Nov. 1, 1973), and *Appeal of Capital Southwest Corp.*, CCH Cal. Tax Rep. para. 204-881 (S.B.E. Jan. 16, 1973) (wherein the Boards respectively upheld dividends and interest income as business or unitary income). In addition, see *Montgomery Ward & Co. v. Commissioner of Tax.*, 276 Minn. 479, 151 N.W.2d 294 (1967); *Great Lakes Pipeline Co. v. Commissioner of Tax.*, 272 Minn. 403, 138 N.W.2d 612 (1965), appeal dismissed, 384 U.S. 718 (1966) (wherein the courts held that interest income was business income subject to apportionment). Cf. *F. W. Woolworth Co. v. Director of Div. of Tax*, 45 N.J. 466, 213 A.2d 1 (1965); *Gulf Oil Corp. v. Morrison*, 120 Vt. 324, 141 A.2d 671 (1958); and *F. W. Woolworth Co. v. Commissioner of Taxes*, 130 Vt. 544, 298 A.2d 839 (1972) (in which dividend income was subject to apportionment either as business income or part of the unitary income of the payee corporation).

In determining the significance of investments to the overall business operations, this court aptly noted in *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911):

> "Nor can it be justly said that investments have no real relationship to the business transacted by a corporation. The possession of large assets is a business advantage of great value; is may give credit which will result in more economical business methods; it may give a standing which shall facilitate purchases; it may enable the corporation to enlarge the field of its activities and in many ways give it business standing and prestige." (220 U.S. 166)

[26]Section 1 of Article IV of the Compact (Jur. St. App. E. 38a) defines nonbusiness income as all income other than business income and defines business income as

> "Income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations."

The regulations of the Commission implement this language (Reg. IV.1, Seventh Annual Report of the Commission, pp. 64-69).

The regulations contain examples of nonbusiness income subject to specific allocation. For example, Reg. IV.1.(c)(4) Example (vi) reads:

> "The taxpayer is engaged in a multistate glass manufacturing business. It also holds a portfolio of stock and interest-bearing securities, the acquisition and holding of which are unrelated to the manufacturing business. The dividends and interest income received are nonbusiness income." (Seventh Annual Report, Multistate Tax Commission (1974), Appendix J, p. 68)

Nor is there merit to the Appellants' wholly irrelevant argument that the Commission's UDITPA regulations are invalid (Appellants' Br. 27, 48). In so arguing, the Appellants have not directed the Court's attention to any provision of UDITPA or any provision in the regulations or to any case authority interpreting UDITPA.[27]

From the foregoing, it is clear that Appellants' efforts to raise a congressional consent issue concerning the Commission's regulations implementing UDITPA lacks support in fact. Furthermore, if the regulations in fact provided for full apportionment of nonbusiness income contrary to UDITPA and changed the traditional rule of assigning income from intangibles to the commercial domicile, this does not invalidate the Compact.

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[27]In support of this argument, they rely instead on cases set forth in footnote 22 (p. 26) and articles cited in footnotes 43, 44 (p. 27) and 68 (p. 48) of their brief. The cases relied upon are not UDITPA cases. Three of the four articles relied upon are not directed to the question of whether or not the UDITPA regulations of the Commission are valid and the fourth article does not analyze the regulations in reference to the UDITPA language and case authority.

The article of the Executive Director of the Commission referred to in footnote 43 and the article of the Commission's general counsel referred to in footnote 68 do not support the propositions for which they are cited. The Commission's staff has never taken the position that the Commission's UDITPA regulations are invalid in any respect or require full apportionment of nonbusiness income.

The fact, as indicated by the Indiana survey (footnote 24, supra; Supplement A), that eighteen states have adopted UDITPA regulations which substantially conform to the Commission's regulations, support their validity.

Furthermore, the courts that have dealt with the question of what constitutes business versus nonbusiness income under UDITPA (Article IV of the Compact) do not disagree with the Commission's regulations because they generally hold that all income which a taxpayer derives from its integrated unitary business operations constitutes business income if the income arises out of activities, or is used, in the regular course of business. See, for example, *Champion International Corp. v. Bureau of Revenue*, 88 N.M. 411, 540 P.2d 1300 (1975), and *Sperry & Hutchinson v. Department of Revenue*, 270 Or. 329, 527 P.2d 729 (1974).

3. The Appellants erroneously argue that the Commission has adopted rules and practices for combined reporting (Appellants' Br. 12, 25-26) and that this interferes with the national interest in the conduct of foreign affairs (Appellants' Br. 35-42 and the sovereignty and revenue policies of nonmember states (Appellants' Br. 45).

The Appellants advance the argument that the Commission has adopted rules and practices on worldwide combination which are contrary to international practice, United States treaty commitments, and federal principles, and have provoked complaints from many of our treaty partners (Appellants' Br. 12-13) and thus interferes with foreign affairs (Appellants' Br. 32-35). Since the Commission has no power to fix or determine the tax liability of any taxpayer for any state on any basis whatsoever; since the Commission has adopted no combined reporting rules and has no uniform practice in regard to combined reporting (either domestic or worldwide); and since there is no international practice or established federal policy concerning worldwide combination for state tax purposes, the Appellants' argument concerning the Compact's alleged interference with national or international affairs is in error.

No treaty which has been ratified by the Senate forbids any state from determining the income of a multinational corporation by application of worldwide combination principles. Thus, there is no conflict between federal treaties and worldwide com-

bination. If there were, the treaty provisions would control. The only regulations issued by the Commission are those pertaining to the division of income under Article IV of the Compact (UDITPA) which do not provide for "combined reporting."[28]

[28]If the Appellants were correct in their contention, which they weave throughout their argument pertaining to the "congressional consent" question, that the Commission has adopted rules and regulations pertaining to the "combined reporting" and "unitary" concepts, we fail to see how this would invalidate the Compact on its face. These are concepts approved by the judiciary and indeed found to be necessary to properly apportion the income of multistate-multinational corporations to the respective states. See *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113 (1920); *Bass, Ratcliff & Gretton v. State Tax Commission*, 266 U.S. 271 (1924); and *Butler Bros. v. McColgan*, 17 Cal. 2d 664, 111 P.2d 334, aff'd 315 U.S. 501 (1942); *Edison California Stores v. McColgan*, 30 Cal.2d 472, 183 P.2d 16 (1947); *Superior Oil Company v. Franchise Tax Board*, 34 Cal. Rptr. 545, 386 P.2d 33 (1963). For a recent discussion on "combined reporting" see Frank M. Keesling, "A Current Look at the Combined Report and Uniformity in Allocation Practices" 42 *Journal of Taxation* 106 (Feb. 1975). Cf. "Multinational Corporations and Income Allocation under Section 482 of the Internal Revenue Code," 89 Harvard L. Rev. 1202.

If Corporation A manufactures a product which it sells to a sales subsidiary Corporation B and Corporation A and B are so interrelated in their business affairs that the separate profits of Corporation A cannot be determined apart from Corporation B and vice versa, it is perfectly logical and necessary to combine Corporation A and B to determine the true income of either Corporation A or Corporation B. Should the results arrived at by this court in *Bass, Ratcliff & Gretton v. State Tax Commission*, 266 U.S. 271 (1924) be any different if the brewing of ale in England was by a parent and its activities in New York were conducted by a subsidiary corporation?

The Indiana Survey (footnote 24, Supplement A, asks the following question: "Are there any situations in which your state goes beyond the corporate shell to consider the unitary corporate business in determining the income tax base? (That is, are there any situations in which your state takes into consideration activities of related corporations in determining the income tax of a corporate taxpayer?)" This survey indicates that 31 states answered the question "yes," including eastern states such as New York and the District of Columbia.

The only question in "combined reporting" is whether or not tax consequences should be different if a unitary trade or business is carried on under one corporate umbrella or several corporate umbrellas. Compare *Butler Bros. v. McColgan, supra* with *Edison California Stores v. McColgan, supra*.

The report of the Special Subcommittee on State Taxation of Interstate Commerce of the Committee on the Judiciary House of Representatives in House Report No. 952, 89th Cong. 1st Sess., at page 1154, noted that:

> "Often corporations which are controlled directly or indirectly by the same interests are so mutually dependent on each other for their success that the books of an individual corporation cannot accurately reflect the corporation's contribution to the profitability of the entire multicorporate enterprise."

It then recommended at page 1155 of the same report that:

> "State tax administrators be allowed to require consolidation in any case where two or more corporations are affiliated by common ties of more than 50 percent of stock ownership and at least one of the affiliates has realty or an employee in the State."

In reference to combined reporting these regulations only provide:

> "If a particular trade or business is carried on by a taxpayer and one or more affiliated corporations, nothing in Article IV or in these regulations shall preclude the use of a 'combined report' whereby the entire business income of such trade or business is apportioned in accordance with Article IV.9. to Article IV.17."[29]

Neither has the Commission adopted any particular practice in regard to combined reporting. In conducting joint audits for member states, the Commission auditors audit in accordance with the guidelines given to them by the tax officials of the member states. If a member state requests that an audit be prepared in accordance with the combined method of reporting (either domestic or worldwide), this method is employed by the Commission auditors for that state. On the other hand, if a member state requests that the Commission auditors furnish it information on the basis of separate accounting or the unitary concept without combined reporting, the Commission auditors follow such guidelines.[30]

If administration of the Compact were at issue (which it is not), it is thus clear that administration

[29]Seventh Annual Report of the Multistate Tax Commission (1974), p. 69, Reg. IV.2.(b)(2).

[30]Appellants state, "During Appellants' limited discovery, it was determined that the combined reporting and full apportionment rules of the Commission have been applied in dozens of multistate and multinational audits, involving large sums of money and as many as eleven states at one time." (Appellants Br. 28-29) What Appellants

of the Compact by the Commission in regard to "combined reporting" does not interfere with the national interest in foreign affairs or the sovereign and revenue policies of nonmember states.

4. **Though totally irrelevant, Appellants erroneously argue that "combined reporting" is not a valid workable concept for the division of income.**

Appellants spend considerable effort in their brief to convince this Court that combined reporting is a bad and unworkable concept (Appellants' Br. 36-37, 41-43, 45).[31] But, this Court has already overruled such a contention in regard to the unitary concept. *Butler Bros. v. McColgan, supra*, 315 U.S. 501 (1941). Combined reporting is simply the application of the unitary concept to determine the income tax liability of a taxpayer whose business operations are so integrated with affiliated corporations that both the taxpayer and affiliated corporations have to be treated as an economic unit for division of income tax purposes. This application of the unitary concept is directed to the problem noted

fail to reveal is that items of income were specifically allocated for some states and liability was determined for other states on the basis of separate accounting or the unitary concept without combination.

[31]Appellants fail to discuss problems associated with the "arms-length" concept employed in Section 482 of the Internal Revenue Code. A law review note entitled, "Multistate Corporations and Income Allocation Under Section 482 of the Internal Revenue Code," 89 Harv. L. Rev. 1202, *supra*, contains an in-depth discussion of the Section 482 approach (separate accounting) as compared to the combined reporting (unitary) approach to the division of income problems. This article belies the simplistic approach Appellants use in their Brief to discuss these questions. Furthermore, as indicated in the law review note, Section 482 adjustments and combined reporting are simply different methods to determine what income of a multinational corporation is properly attributable to United States sources. The note further indicates that in actual practice, the Internal Revenue Service and the Courts have resorted to "combination" or unity concepts in applying Section 482 of the Internal Revenue Code.

by this Court in *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 133 (1920);

> "The profits of the corporation were largely earned by a series of transactions beginning with manufacture in Connecticut and ending with sales in another state * * * The legislature, in attempting to put upon this business its fair share of the burden of taxation, was faced with the impossibility of allocating specifically the profits earned by the processes conducted in its borders." (254 U.S. 120, 121)[32]

But whether or not combined reporting is good or bad is totally irrelevant.[33] The fact that the Commission staff believes it to be a valid and workable concept for the attribution of income and some member states have adopted combined reporting as a matter of state policy has nothing to do with the validity of the Compact. If the states insist on its use and the federal government believes that it conflicts with federal policy, the federal government has ample power to deal with this question.

[32]The need for "combined reporting" under this test, on the international level, can be illustrated by an actual example of a multinational corporation conducting unitary operations in Canada and Idaho through two subsidiary corporations. The Canadian subsidiary processes pulp used for the manufacture of paper by the American subsidiary. The pulp is transported from the Canadian subsidiary to the American subsidiary by a pipeline crossing international boundaries. Under these circumstances, it is impossible to separate the profits of the Canadian subsidiary from that of the American subsidiary because the profits of the two corporations from the manufacture of pulp and paper products were earned by a series of transactions beginning in Canada and ending in sales in Idaho. Thus, logic dictates that "combined reporting" be utilized to determine the profits of either of these two subsidiaries.

[33]Appellants on page 38 of their Brief infer that the proposed United States-United Kingdom Tax Treaty prevents worldwide combination by the states. It does so only in regard to United States subsidiaries of foreign United Kingdom parent corporations. It does not prevent worldwide combination of a domestic United States parent with its worldwide affiliated corporations. No audit conducted by the Commission on behalf of any member state has combined the income of a foreign parent with a domestic subsidiary. Furthermore,

D. **The Appellants' argument that the Compact has a serious impact on and burdens interstate commerce (Appellants' Br. 42-44, 48) and interferes with the sovereignty and revenue policies of the nonmember states (Appellants' Br. 45-47) erroneously attributes nonuniformity to the Compact and constitutes a rehash of Appellants' erroneous arguments concerning "combined reporting" and "full apportionment of nonbusiness income."**

In arguing that the Compact has a serious impact on or burdens interstate commerce (Appellants' Br. 42-45, 48), Appellants assert that the unitary concept and the apportionment of nonbusiness income subjects interstate businesses to burdensome multiple taxation and interferes with the national interest in promoting low-cost efficient interstate business.

This argument of Appellants is replete with many invalid assumptions. As heretofore indicated the Compact has nothing to do with the subject matter of combined reporting (See *supra*, p. 62) and the Commission has issued no rules and has adopted no uniform practice concerning combined reporting (See *supra*, pp. 69-72). Furthermore, as heretofore indicated, Article IV of the Compact (UDITPA) specifically provides for the allocation of nonbusiness income as do the rules and regulations of the Commission (See *supra*, p. 67). Since the only provision of the Compact that has anything

this treaty establishes no federal principle or treaty commitment until ratified by the United States Senate.

to do with this argument of Appellant is the language of UDITPA (Article IV of the Compact), unless the adoption of the uniform UDITPA language by the states (members and nonmembers of the Compact) interferes with the national interest in promoting interstate commerce, there is absolutely no validity to or factual or legal support for Appellants' commerce clause argument. Obviously, the adoption of uniform legislation promotes rather than interferes with interstate commerce.

The fact that the Compact has achieved significant uniformity in the field of state and local taxation of multistate businesses and thus promotes interstate commerce is also borne out by the Indiana survey. This survey, appended as Supplement A to this brief, shows startling results. This survey was conducted to determine what progress the states have made in the last ten years (the life of the Compact) toward uniformity and state taxation of multistate businesses. While it cannot be ascertained what role the Compact standing alone played in this progress toward uniformity, the Compact undoubtedly had a significant role. In light of these results and the uniformity inherent in the Compact itself, Appellants' assertion that the Compact and Commission produce confusion, inefficiency, inconsistent tax determination and multiple taxation (Appellants' Br. 13-14) is totally unfounded.[34]

[34]This assertion of Appellants is completely unsupported by the record and is immaterial since taxpayers have no constitutional rights under the commerce clause to be protected from these alleged results. Furthermore, this argument of Appellants is inconsistent with its assertion that the Compact is transforming state taxation of multistate businesses. (Jur. St. App. A. 14a)

It is therefore respectfully submitted that the Compact promotes the national interest under the commerce clause and does not interfere with or burden interstate commerce.

Neither does the adoption of uniform legislation in the Compact interfere with the sovereignty and revenue policies of nonmember states. No provision of the Compact or action of the Commission precludes other states from adopting any revenue policies consistent with their own laws and constitutional guidelines.[35]

E. **The Appellees' Response to Miscellaneous Arguments and Misstatements of the Appellants.**

We have heretofore dealt with the major themes of the Appellants' argument indicating why, in our opinion, they have nothing to do with the validity of the Compact on its face and generally with the operations of the Compact by the Commission. Furthermore, we have pointed out some of the misstatements, erroneous conclusions and conjectures on which these major themes are based. By a few examples, we wish to further demonstrate here the conclusionary, conjectural and erroneous nature of the Appellants argument.

The Appellants depict the Commission as an

[35]The Appellants' argument that the Compact interferes with the sovereignty and revenue policies of nonmember states is refuted by the Thirteenth Resolution of the National Association of Tax Administrators at its Forty-Fifth Annual meeting at Williamsburg, Virginia, on June 3, 1977, wherein NATA resolved without dissent:

"* * * that the National Association of Tax Administrators does not believe, that as a matter of policy in its present form the Multistate Tax Compact interferes with the sovereignty and the revenue policies of the nonmember states."

independent commission or body (Appellants' Br. 12-12, 14, 20, 30, 32, 34). Appellants never explain what they mean by "independent." The Commission is simply composed of the tax administrators of the member states and does not operate independently of those states. The Commission confers no power upon them. Any power they exercise as a result of participation in the deliberations and recommendations of the Commission is the power they derive as being the tax administrators of their respective states. It is highly misleading for the Appellants to attribute any independent power to the Commission or to refer to it as an independent body when that is squarely in conflict with the Compact. The Commission, in order to accomplish anything, is completely dependent upon subsequent action by the states. It is individual state action and not the Compact or Commission, which is the subject matter of Appellants' complaints.

On pages 28 and 30 of their Brief, the Appellants infer that the Commission has a large staff to carry out its work "with more staff and greater powers than many of the commissions subjected to congressional review." The Commission staff at the time this litigation started consisted of an executive director, clerical staff in the Boulder office and three auditors. It has since added six auditors (three of those in the last six months) and one attorney. There is absolutely no support in the Appellants' Brief or record in this cause that such staff is larger than or that the Commission has greater powers than

many of the commissions subjected to congressional review.

Contrary to Appellants' assertions throughout their Brief, the staff personnel are not the Compact nor its Commission. They do not establish the advisory policies or recommendations of the Commission. It is thus error for the Appellants to refer to statements of the staff as representing the policy of the Commission or that they have anything to do with Compact. For example, the Commission staff's statements referred to on page 25 of Appellants' Brief, footnote 40, do not constitute a policy of the Commission or a statement of its practices.

Further, the Appellants in their Brief take staff statements out of context and cite them in support of statements in the Brief which they do not support. For example, Appellants assert:

> "But the Commission has adopted rules and practices calling for full apportionment of the non-business income of multistate and multinational taxpayers."

and cite in support thereof the statement of the Executive Director of the Commission pertaining to full apportionment on page 47 of the Commission's Seventh Annual Report (1974) (Appellants' Br. 27). The quoted statement is from a paper entitled, "Attribution of Corporate Income Among Different Jurisdictions for Tax Purposes" which did not discuss the rules or practices of the Commission.

As a further example, Appellants misrepresent the facts by asserting that Commission representatives have indicated that the Commission's UDITPA regulations are inconsistent with UDITPA (Appellants' Br. 48). In support of this statement, they cite the law review article written by the Commission's general counsel entitled, "Taxation of Income from Intangibles to Multistate-Multinational Corporations," 29 Vand. L. Rev. 401 (1976). The Commission's general counsel did not discuss the validity of these regulations in that article.

In other portions of the Appellants' Brief, the Appellants refer to matters that have nothing to do with the Compact, its operations or its staff. For example, on pages 37-38 and 40-41 of the Appellants' Brief, Appellants discuss the "permanent establishment" jurisdictional test which they erroneously commingle and confuse with the "arms length" standard of Section 482 of the Internal Revenue Code.

The "permanent establishment" jurisdictional standard has absolutely nothing to do with the Compact or any activity whatsoever of the Commission or its staff. The Compact does not contain any jurisdictional standards for imposition of any state or local taxes.

The deceptive nature of the Appellants' argument is illustrated by the Appellants' reference on page 40 of their brief to the Report of the Task

Force on Foreign Source Income of the House Committee on Ways and Means. They there infer that the report discusses the Compact in conjunction with the unitary business concept. That report does not tie the Compact to the unitary concept and only mentions the Compact in passing.

It would serve little purpose here to analyze further the lack of logic or support for the "argument" contained in the Appellants' Brief. This argument is full of misstatements and conjecture which have nothing to do with the validity of the Compact on its face or its administration. It should be ignored by this Court in resolving the questions at issue.

VI

CONCLUSION

The Appellants in their Amended Complaint (A. 2-10) ask that the Compact be declared invalid on its face and that its Commission be disbanded because they erroneously assert (1) the Compact is invalid without congressional consent; and (2) the Compact contravenes commerce clause limitations and denies Appellants Fourteenth Amendment and Fourth Amendment guarantees under the Constitution of the United States. Since the compact legislation of the member states is presumed to be constitutional, and since the Compact contains a severability clause, the Appellants have the burden to demonstrate to this Court what provisions, if any, of the Compact contravene these constitutional limitations.

The three-judge court below carefully analyzed

the issues raised in the Amended Complaint and held the Compact valid in all respects. (Jur. St. App. A, 1a-21)

The basic issues raised by Appellants on appeal are (1) whether the *Virginia v. Tennessee* test correctly sets forth the standard for determining when congressional consent is required for any compact or agreement among the states; and (2) whether the Compact is valid under this test. Appellants would limit the application of the *Virginia v. Tennessee* test to boundary agreements or dicta (Appellants' Br. 12) and assert that it has no application to what they term "modern complex compacts" (Appellants' Br. 34).

In regard to their argument that the *Virginia v. Tennessee* test is limited to boundary disputes or is dicta, decisions of this Court and other courts, as well as congressional consideration, have never so limited its application. It is thus apparent that the *Virginia v. Tennessee* test has been given much wider application than that contended for by Appellants. This is not surprising inasmuch as the *Virginia v. Tennessee* test involves a fundamental and timeless understanding of the proper relationship between the Nation and the states. It was evolved to reconcile the powers delegated to the federal government under the Constitution of the United States with the powers reserved to the states under that document. It has stood the test of time and to our knowledge has been consistently applied in all the

congressional consent compact cases and otherwise. Appellants have set forth no reasons in their brief why this Court should now abandon that test.

Wherefore, it is respectfully submitted that this Court affirm the judgment of the three-judge district court below.

Respectfully submitted,

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SUPPLEMENT A
RESULTS OF A SURVEY ON THE UNIFORMITY OF STATE LAWS BY THE STATE OF INDIANA
(February 15, 1977)

Summary

A questionnaire on the degree of uniformity of tax law among the states was sent in October 1976 to all fifty states and the District of Columbia. A one hundred per cent response rate was achieved, although not until nearly three months after the original request for information—causing a slight delay in the original timetable for compilation of the results. The data presented here is based on representations made by the states in response to the questionnaire itself as well as to follow-up telephone conversations.

The results of the survey were very encouraging. We believe that on the basis of the information assembled it is reasonable to conclude that the present degree of uniformity, with respect to sales, use, and corporate income (or franchise) taxes, is considerable. Furthermore, it does appear that there has been a substantial increase in uniformity over the last decade.

All states with corporate income taxes, for example, now use some sort of mathematical formula to determine what corporate income is to be attributed where. Most but not all states also did so ten years ago. But twice as many states (25) as ten years ago now have adopted the Uniform Division of In-

come for Tax Purposes Act (UDITPA) without significant modification or revision. More importantly, only six of those states with corporate income taxes now employ an apportionment formula *not* substantially similar to an equally-weighted three factor formula. In other words, 39 of 45 states use an equally-weighted three factor formula—indeed persuasive evidence of uniformity among the states. And two other states have tax laws substantially in accord with UDITPA, except that one has eliminated the sales factor while the other gives it double weight.

Perhaps of even greater significance, however, is the evidence that considerable uniformity now exists with respect to the interpretation of tax laws. The results of this survey indicate that *eighteen* states now use regulations interpreting UDITPA which substantially conform with those proposed by the Multistate Tax Commission.

Most of our other findings corroborate this conclusion of substantial and increased uniformity among the states:

Corporate income (or franchise) taxes

Most states (38) distinguish between income subject to allocation and income subject to apportionment; most of those states (28) employ a "business/non-business" criterion to make that distinction.

Most states (31) now include dividends in the apportionment base under some circumstances.

Most states (31) consider the unitary corporate business in determining the income base, at least in some situations.

Thirty-eight states admit to sharing income tax information with other states or organizations.

Most states (36) use federal taxable income in determining the tax base; only 20 did so ten years ago.

Forty-two states allow the federal asset depreciation range, while only 29 did so ten years ago.

Fifteen states assign audits to an outside organization or participate in cooperative audits (all are full voting members of the Multistate Tax Commission); no states did so ten years ago.

Sixteen states now require corporations to account for all out-of-state sales, property, and payroll on a state-by-state basis, either by return or audit—more than double the number that did so ten years ago.

Sales and use taxes

Most states (42) allow credit against use tax liability on purchases other than vehicles for sales tax due and paid in other states; only 32 states did so ten years ago.

Thirty-five states accept the Uniform Sales and Use Tax Exemption Certificate sponsored by the Multistate Tax Commission. No such certificate existed ten years ago.

Twenty-three states recognize and comply with the Uniform Sales and Use Tax Jurisdictional standard of the Multistate Tax Commission. No such standard existed ten years ago.

Twenty-eight states furnish information to

otherd states regarding out-of-state purchasers who claim exemption from sales tax in those states.

The questions and the compiled information follow. The answers to open-ended questions have not been compiled because of major differences among the states in the quality of responses.

1(A). Does your state use a mathematical formula to determine what income of a corporate business is to be attributed to your state for tax purposes?
YES: 45 NO: 0 N/A: 6

1(B). Had it done so 10 years ago?
YES: 35 NO: 2 N/A: 13

2(A). Has your state enacted UDITPA (The Uniform Division of Income for Tax Purposes Act) without significant modification or revision?
YES: 25 NO: 20 N/A: 6

2(B). Had it done so 10 years ago?
YES: 12 NO: 26 N/A: 13

3(A). Has your state adopted regulations interpreting UDITPA which substantially conform with those proposed by the Multistate Tax Commission (first proposed September 1971, revised February 1973)?
YES: 18 NO: 8 N/A: 25

3(B). If so, when did your state adopt these regulations? (First proposed September 1971, revised February 1973)

4(A). If your state has not enacted UDITPA, is its apportionment formula substantially similar to a formula employing the equally-weighted factors of sales, property, and payroll?
YES: 14 NO: 6 N/A: 31

4(C). When did your state adopt this formula?

TABLE I

State	1A	1B	2A	2B	3A	3B	4A	4C
Alabama	YES	YES	YES[1]	NO	YES[1]	1974	N/A	N/A
Alaska	YES	YES	YES	YES	YES	1972	N/A	N/A
Arizona	YES	YES	NO	NO	N/A	N/A	YES[2]	1954
Arkansas	YES	YES	YES	YES	YES	1974	N/A	N/A
California	YES	YES	YES	YES	YES	1972	N/A	N/A
Colorado	YES	YES	YES	NO	YES	1976[3]	N/A	N/A
Connecticut	YES	YES	NO	NO	N/A	N/A	YES[4]	1967
Delaware	YES	YES	NO	NO	N/A	N/A	YES[5]	1958
District of Columbia	YES	YES	YES	YES	NO	N/A	N/A	N/A
Florida	YES	N/A[6]	NO	N/A[6]	N/A	N/A	NO[7]	1971
Georgia	YES	YES	NO	NO	N/A	N/A	YES[8]	1968
Hawaii	YES	YES	YES	NO	NO	N/A	N/A	N/A
Idaho	YES	YES	YES	YES	YES	1973	N/A	N/A
Illinois	YES	N/A[9]	YES	N/A[9]	NO	N/A	N/A	N/A
Indiana	YES	YES	YES	YES	YES	1972	N/A	N/A
Iowa	YES	YES	NO	NO	N/A	N/A	NO	1934
Kansas	YES	YES	YES	YES	YES[10]	N/A	N/A	N/A
Kentucky	YES	YES	YES	YES[11]	YES	1971	N/A	N/A
Louisiana	YES[12]	YES	NO	NO	N/A	N/A	YES[13]	1948
Maine	YES	N/A[14]	YES	N/A[14]	YES	1976	N/A	N/A
Maryland	YES	YES	NO	NO	N/A	N/A	YES[15]	1939
Massachusetts	YES	YES	NO	NO	N/A	N/A	NO	1975
Michigan	N/A[16]	N/A[16]	N/A[17]	N/A	N/A	N/A	N/A	N/A
Minnesota	YES	YES	NO	NO	N/A	N/A	YES[18]	1939
Mississippi	YES	YES	NO	NO	N/A	N/A	YES[19]	1954

TABLE I—Continued

State	1A	1B	2A	2B	3A	3B	4A	4C
Missouri	YES	YES	YES	NO	YES	1975	N/A	N/A
Montana	YES	YES	YES	NO[20]	YES	1976	N/A	N/A
Nebraska	YES	N/A[21]	YES	N/A	YES	1974	N/A	N/A
Nevada	N/A[22]	N/A	N/A	N/A	N/A	N/A	N/A	N/A
New Hampshire	YES	N/A[23]	NO[24]	N/A	N/A	N/A	YES[24]	1969
New Jersey	YES	YES	NO	NO	N/A	N/A	YES[25]	1946
New Mexico	YES	NO	YES	NO[26]	YES	1973	N/A	N/A
New York	YES	YES	NO	NO	N/A	N/A	NO	1975
North Carolina	YES	YES	YES	NO[27]	YES[28]	N/A	N/A	N/A
North Dakota	YES	YES	YES	YES	YES	1972	N/A	N/A
Ohio	YES	N/A[29]	NO[29]	N/A[29]	N/A	N/A	YES[29]	1971[29]
Oklahoma	YES	NO	NO	NO	N/A	N/A	YES[30]	1941
Oregon	YES	YES	YES	YES	YES	1971	N/A	N/A
Pennsylvania	YES	YES	YES[31]	NO[32]	NO[33]	N/A	N/A	N/A
Rhode Island	YES	YES	NO[34]	NO	N/A	N/A	YES[34]	1947
South Carolina	YES	YES	YES[35]	YES	NO	N/A	N/A	N/A
South Dakota	N/A[36]	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Tennessee	YES	YES	YES[37]	NO	NO[38]	N/A	N/A	N/A
Texas	N/A[39]	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Utah	YES	YES	YES	NO[40]	YES	1972	N/A	N/A
Vermont	YES	YES	NO	NO	N/A	N/A	YES[41]	1966
Virginia	YES	YES	YES[42]	YES	NO	N/A	N/A	N/A
Washington	N/A[43]	N/A	N/A	N/A	N/A	N/A	N/A	N/A
West Virginia	YES	N/A[44]	NO[45]	N/A	NO[46]	N/A	NO[45]	1967
Wisconsin	YES	YES	NO	NO	N/A	N/A	NO	1971
Wyoming	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

FOOTNOTES—TABLE I

[1]Alabama's corporate income tax statute is vague on how the state is to determine what portion of a corporation's income is to be attributed to the state for tax purposes. On September 6, 1967, the Alabama Legislature enacted the Multistate Tax Compact, which includes UDITPA, subject to congressional enactment of a Multistate Tax Compact Consent Bill. On September 12, 1967, the Alabama Department of Revenue promulgated regulations which adopt the UDITPA provisions as the basis on which to determine the amount of a corporation's income which is attributable to a state. Subsequently, Alabama has also substantially adopted the regulations interpreting UDITPA proposed by the Multistate Tax Commission.

[2]While Arizona does allow use of an equally-weighted three factor formula, it also permits formulas employing more factors, or various combinations of factors. Arizona law mentions the separate accounting method first, and assigns taxing officials considerably more discretionary power than does UDITPA.

[3]Colorado has been using the MTC regulations unofficially since 1973. They were officially adopted as of October 15, 1976.

[4]Connecticut's law differs from UDITPA in that its property factor is based on average net book value. Connecticut also attributes all sales to the state of destination.

[5]There are numerous differences between UDITPA and the Delaware tax formula.

[6]Florida enacted its corporate income tax in 1971.

[7]Florida's corporate income tax is substantially in accord with UDITPA, the major difference being a double-weighting of the sales factor by Florida.

[8]Georgia is sometimes considered to be a UDITPA state, but its payroll and sales factors are substantially different.

[9]The Illinois Income Tax Act was not enacted until 1969.

[10]The regulations proposed by the Multistate Tax Commission are generally followed by Kansas, but have not been formally adopted.

[11]Kentucky adopted UDITPA in 1966, effective in 1967.

[12]Louisiana provides two methods for determining Louisiana net income, the apportionment method and the separate accounting method. A mathematical formula is used under the apportionment method.

[13]There are numerous differences between UDITPA and Louisiana's apportionment formula.

[14]Maine enacted its corporate income tax law in 1969.

[15]Maryland's apportionment formula differs significantly from UDITPA in that sales are attributable to the state where secured or negotiated, a feature that could result in double taxation.

[16]Michigan does not now have a corporate income tax. In 1976 its corporate income tax was replaced by a "Single Business Tax,"

FOOTNOTES—TABLE I—Continued

which does not use corporate income as a taxable base. Michigan's corporate income tax was originally enacted in 1967.

[17]Michigan was a UDITPA state, while it had a corporate income tax.

[18]Minnesota allows an equally-weighted three factor formula, but it also provides for weighted factors, single factor formulas, and the separate accounting method in some cases.

[19]Mississippi uses three factors, but the property factor is limited to manufacturing or selling assets, the labor factor to manufacturing or selling payrolls and sales are assigned to the state in which the sale is actually consummated.

[20]UDITPA was adopted into Montana regulations on January 1, 1967. It subsequently became a part of Montana statutes for years ended on or after December 31, 1973.

[21]Nebraska adopted UDITPA in October 1967.

[22]Nevada has no corporate income tax.

[23]New Hampshire had no corporate income tax prior to its Business Profits Tax, effective January 1, 1970.

[24]New Hampshire does not allocate any of the income of a corporation. It is sometimes considered a UDITPA state, as its formula is not substantially different.

[25]There are numerous differences between UDITPA and New Jersey's apportionment formula. The three factor formula has been used since 1946 in determining New Jersey's tax base. Changes have been made in the formula for the allocation of receipts, with the other factor formulas remaining the same. The present formula was adopted in 1967.

[26]UDITPA became effective in New Mexico on January 1, 1967.

[27]North Carolina enacted UDITPA in 1967.

[28]North Carolina has adopted regulations proposed by the National Association of Tax Administrators (NATA), which are substantially similar to those proposed by the Multistate Tax Commission.

[29]Ohio adopted an income base for its corporate franchise tax in 1971. The alternative base, Ohio net book worth, was adopted in 1902. The apportionment of the net income base generally follows UDITPA.

[30]Oklahoma's law is similar to UDITPA in several respects, enough so that it is sometimes considered a UDITPA state.

[31]Pennsylvania departs from UDITPA in that its statutes contain a provision for sales to be attributed to the state of destination. As an administrative rule, however, Pennsylvania utilizes the "Throw out Rule" (that is, sales into non-nexus states are thrown out of both the numerator and the denominator of the formula) when the sales factor is deemed to be disproportionate to the property and/or payroll factor percentages.

[32]Pennsylvania's present corporate tax was adopted in 1971.

FOOTNOTES—TABLE I—Continued

[33]Pennsylvania's adopted and proposed regulations have used the MTC's proposed regulations as a reference. These regulations have been adopted and proposed piecemeal since 1975.

[34]Rhode Island does not allocate any corporate income; all income is apportioned by the three factor formula. All sales are attributed to the state of destination.

[35]South Carolina employs the throwback rule for sales into states without a corporate income tax, as well as for sales into states in which the seller lacks situs.

[36]South Dakota has no corporate income tax.

[37]Tennessee has slightly modified the sales factor to include sales on a destination basis only, as contrasted with UDITPA, which employs a "throwback" rule for sales not taxable in another state.

[38]Tennessee has indicated that the MTC regulations will be proposed for adoption in that state.

[39]Texas has no corporate income tax.

[40]Utah enacted UDITPA January 1, 1967.

[41]Vermont is not considered a UDITPA state primarily because it apportions sales on an origin basis—a significant departure from UDITPA which could result in double taxation of out-of-state sales.

[42]There are several minor differences between UDITPA and Virginia's corporate income tax. Nevertheless, Virginia is widely regarded as a UDITPA state. The major difference is that Virginia does not use the "business/non-business" criterion for distinguishing between allocable and apportionable income.

[43]Washington has no corporate income tax.

[44]West Virginia's Corporate Net Income Tax was established in 1967.

[45]West Virginia has adopted the MTC regulations in part.

[46]West Virginia's formula is substantially similar to UDITPA, but it has eliminated the sales factor, leaving a two factor formula.

6(A). Does your state distinguish between income subject to apportionment by formula and income subject to apportionment by allocation in determining where corporate income is to be attributed for tax purposes?
YES: 38 NO: 7 N/A: 6

(B). If so, what is the basis for the distinction, i.e., what are the criteria for determining

whether income is allocable or apportionable?
Primarily a business/non-business distinction (B/NB): 28
Primarily a criterion other than business/non-business: 10
N/A: 13

7(A). Does your state (ever) include dividends in the apportionment base?
YES: 31 NO: 14 N/A: 6

8(A). Are there any situations in which your state goes beyond the corporate shell to consider the unitary corporate business in determining the income tax base? (That is, are there any situations in which your state takes into consideration activities of related corporations in determining the income tax of a corporate taxpayer?)
YES: 31 NO: 14 N/A: 6

9(A). Do you (ever) require corporations to account for all out-of-state sales, property, and payroll on a state-by-state basis (either by return or during audits)?
YES: 16 NO: 29 N/A: 6

(B). Did you do so ten years ago?
YES: 7 NO: 31 N/A: 13

TABLE II

State	6A	6B	7A	8A	9A	9B
Alabama	YES	B/NB	YES	NO	NO	NO
Alaska	YES	B/NB	YES	YES	YES	NO
Arizona	YES	OTHER	YES[1]	NO	NO	NO
Arkansas	YES	B/NB	YES	NO	YES	NO
California	YES	B/NB	YES	YES	YES	YES
Colorado	YES	B/NB[2]	YES[3]	YES	YES	NO
Connecticut	YES	B/NB	YES	NO	NO	NO
Delaware	YES	OTHER	NO	NO	NO	NO
District of Columbia	YES	B/NB	NO	YES	NO	NO
Florida	NO	N/A	NO	YES	NO	N/A[4]
Georgia	YES	OTHER	NO	YES	YES	YES
Hawaii	YES	B/NB	NO	NO	NO	NO
Idaho	YES	B/NB	YES	YES	NO	NO
Illinois	YES	B/NB	YES	NO[5]	NO	N/A[6]
Indiana	YES	B/NB	YES	YES	YES	YES
Iowa	YES	B/NB	YES	YES	YES[7]	NO
Kansas	YES	B/NB	YES	YES	YES	YES
Kentucky	YES	B/NB	NO	YES	YES	YES
Louisiana	YES	OTHER	NO	YES	NO	NO
Maine	YES	B/NB	YES	YES	NO	N/A[8]
Maryland	YES	OTHER[9]	YES	NO	YES	YES
Massachusetts	NO	N/A	YES	YES	NO	NO
Michigan	N/A	N/A	N/A	N/A	N/A	N/A
Minnesota	YES	B/NB	YES	YES	NO	NO
Mississippi	YES	B/NB	NO	YES	NO	NO

TABLE II—Continued

State	6A	6B	7A	8A	9A	9B
Missouri	YES	B/NB	YES	YES	YES	NO
Montana	YES	B/NB	YES	YES	YES	YES
Nebraska	YES	B/NB	YES	YES	NO	N/A[10]
Nevada	N/A	N/A	N/A	N/A	N/A	N/A
New Hampshire	NO	N/A	YES	NO[11]	YES	N/A[12]
New Jersey	NO	N/A	YES	NO	NO	NO
New Mexico	YES	B/NB	YES	YES	YES	NO
New York	NO	N/A	YES	YES	NO	NO
North Carolina	YES	B/NB	YES	YES	NO	NO
North Dakota	YES	B/NB	YES	YES	YES	NO
Ohio	YES	OTHER	NO	YES	NO	N/A[13]
Oklahoma	YES	OTHER	NO	YES	NO	NO
Oregon	YES	B/NB	YES	YES	NO	NO
Pennsylvania	YES	B/NB	NO	NO	NO	NO
Rhode Island	NO	N/A	NO	NO	NO	NO
South Carolina	YES	OTHER	NO	NO	NO	NO
South Dakota	N/A	N/A	N/A	N/A	N/A	N/A
Tennessee	YES	B/NB	YES[14]	YES	NO	NO
Texas	N/A	N/A	N/A	N/A	N/A	N/A
Utah	YES	B/NB	YES	YES	NO	NO
Vermont	NO	N/A	NO	NO	NO	NO
Virginia	YES	OTHER	YES	YES	YES	NO
Washington	N/A	N/A	N/A	N/A	N/A	N/A
West Virginia	YES	B/NB	YES	YES	NO	N/A[15]
Wisconsin	YES	OTHER[16]	YES	YES[17]	NO	NO
Wyoming	N/A	N/A	N/A	N/A	N/A	N/A

FOOTNOTES—TABLE II

[1]Dividends are included in the apportionment base only to the extent that they exceed interest expense.

[2]Colorado also permits corporations to use a two factor formula, sales and property. The two factor formula uses criteria other than the "business/non-business" distinction to determine whether income is allocable or apportionable.

[3]If dividends are business income, they will be included in the apportionment base of Colorado's three factor formula (UDITPA). Colorado's two factor formula, however, directly allocates dividends.

[4]Florida enacted its corporate income tax in 1971.

[5]Illinois previously used the unitary or combined method of apportionment in appropriate circumstances for taxable years ended prior to November 1, 1975.

[6]Illinois enacted its corporate income tax in 1969.

[7]Corporations are required to account only for all out-of-state sales on a state-by-state basis, since Iowa employs a one factor formula based on sales.

[8]Maine enacted its corporate income tax in 1969.

[9]Maryland uses the "business/non-business" criterion in addition to several other criteria for distinguishing between allocable and apportionable income.

[10]Nebraska enacted its corporate income tax in 1967.

[11]New Hampshire does not consider the unitary corporate business in determining the income tax base. However, possible implementation of such a policy, under certain circumstances, is now under review.

[12]New Hampshire's corporate income tax became effective in 1970.

[13]Ohio adopted income as an alternative base for its corporate franchise tax in 1971.

[14]Tennessee prefers a strict interpretation of UDITPA, and does not go along with the trend of defining as much income as possible as "business" income and thus including it in the apportionment base.

[15]West Virginia did not enact its Corporate Net Income Tax until 1967.

[16]Wisconsin employs the "business/non-business" distinction to a limited extent by allocating rental and royalty from tangible property not directly used in the production of business income. All income from farms, mines, and quarries are allocated to the situs of the property; all other income is apportionable.

[17]Inter-company transactions may be adjusted under provisions of Wisconsin law similar Section 482 of the Internal Revenue Code.

10(A). Do you ever perform an audit for another state or permit another state or outside

party to perform an audit for you; or do you ever cooperate with another state in assigning an audit to an outside party or organization?

YES: 15 NO: 30 N/A: 6

(B). If so, what basis, with whom, and to whom? Assign to the Multistate Tax Commission: 15 (A few of the states who assign audits to the MTC *also* participate in cooperative audits to a limited extent.)
Other: 0 N/A: 36

(C). Did you do so ten years ago?
YES: 0 NO: 38 N/A: 13

11(A). Do you ever share income tax information with other states or corporations?
YES: 38 NO: 7 N/A: 6

TABLE III

State	10A	10B	10C	11A
Alabama	NO	N/A	NO	YES
Alaska	YES	MTC	NO	YES
Arizona	NO	N/A	NO	YES
Arkansas	YES	MTC	NO	YES
California	YES	MTC	NO	YES
Colorado	YES	MTC[1]	NO	YES
Connecticut	NO	N/A	NO	NO
Delaware	NO	N/A	NO	YES
District of Columbia	NO	N/A	NO	YES
Florida	NO	N/A	N/A[2]	YES
Georgia	NO	N/A	NO	NO
Hawaii	YES	MTC	NO	YES
Idaho	YES	MTC[3]	NO	YES
Illinois	NO	N/A	N/A[4]	YES
Indiana	YES	MTC	NO	YES
Iowa	NO	N/A	NO	NO
Kansas	YES	MTC[5]	NO	YES
Kentucky	NO	N/A	NO	YES
Louisiana	NO[6]	N/A	NO	YES
Maine	NO	N/A	N/A[7]	NO
Maryland	NO	N/A	NO	YES
Massachusetts	NO	N/A	NO	YES
Michigan	N/A	N/A	N/A	N/A
Minnesota	NO	N/A	NO	YES
Mississippi	NO	N/A	NO	YES

State	10A	10B	10C	11A
Missouri	YES	MTC	NO	YES
Montana	YES	MTC[8]	NO	YES
Nebraska	YES	MTC[9]	N/A[10]	YES
Nevada	N/A	N/A	N/A	N/A
New Hampshire	NO	N/A	N/A[11]	NO
New Jersey	NO	N/A	NO	NO
New Mexico	YES	MTC	NO	YES
New York	NO	N/A	NO	YES
North Carolina	NO	N/A	NO	YES
North Dakota	YES	MTC[12]	NO	YES
Ohio	NO	N/A	N/A[13]	YES
Oklahoma	NO	N/A	NO	YES
Oregon	YES	MTC	NO	YES
Pennsylvania	NO	N/A	NO	YES
Rhode Island	NO	N/A	NO	YES
South Carolina	NO	N/A	NO	YES
South Dakota	N/A	N/A	N/A	N/A
Tennessee	NO	N/A	NO	YES
Texas	N/A	N/A	N/A	N/A
Utah	YES	MTC	NO	YES
Vermont	NO	N/A	NO	YES
Virginia	NO	N/A	NO	YES
Washington	N/A	N/A	N/A	N/A
West Virginia	NO	N/A	N/A[14]	NO[15]
Wisconsin	NO	N/A	NO	YES
Wyoming	N/A	N/A	N/A	N/A

FOOTNOTES—TABLE III

[1]Colorado law allows it to enter into an agreement with other states for joint audits.

[2]Florida had no corporate income tax ten years ago.

[3]Idaho also joins with other states to perform cooperative audits.

[4]Illinois had no corporate income tax ten years ago.

[5]Kansas also joins with other states to perform cooperative audits.

[6]Louisiana can join with other states to perform cooperative audits.

[7]Maine had no corporate income tax ten years ago.

[8]Montana also joins with other states to perform cooperative audits.

[9]Nebraska also joins with other states to perform cooperative audits.

[10]Nebraska had no corporate income tax ten years ago.

[11]New Hampshire had no corporate income tax ten years ago.

[12]North Dakota also joins with other states to perform cooperative audits.

[13]Ohio had no corporate income tax ten years ago.

[14]West Virginia had no net corporate income tax ten years ago.

[15]West Virginia shares gross income tax information with West Virginia municipalities only.

12(A). Does your state use federal taxable income in determining the income base?

YES: 36 NO: 9 N/A: 6

(B). If so, what line of Form 1120?

Line 28: 15 Line 30: 20 N/A: 15

(C). Did it do so 10 years ago?

YES: 20 NO: 18 N/A: 13

13(A). Does your state allow the federal asset depreciation range?

YES: 42 NO: 3 N/A: 6

(B). If so, when did it start doing so?
(FF indicates that the state followed the federal practice in effect at the time.)

Thirteen states have begun allowing the federal ADR since 1966, including the seven states that have adopted corporate income taxes since then. (In addition, Vermont began allowing the ADR in 1966.)

14. What jurisdictional standards does your state apply which are different from those imposed by the U.S. Constitution and Public Law 86-272 (73 Stat. 555, 15 U.S.C. 381-384) with respect to out-of-state sellers selling into your state?

Few states apply any jurisdictional standards in addition to P.L. 86-272. Some apply standards only very slightly more restrictive than those imposed by the constitution and the federal government. But the response to this survey indicates that no state is attempting to apply standards apparently prohibited by P.L. 272. Several states, however, admit to using a narrow and very strict interpretation of that law as their standard.

The District of Columbia claims exemption from the provisions of P.L. 272 on the grounds that the District is not a state. Under the provisions of their law, they tax all corporations engaged in a trade or business within D.C. or receiving income from sources within D.C. On the sale of tangible personal property, the corporation must have an office, warehouse, or other place of business in the District to be subject to the D.C. Franchise Tax.

15(A). Regarding the sales factor, are all sales attributed to the state of destination, without regard to the seller's business situs in that state?

YES: 15 NO: 29 N/A: 7

(B). If not, on what basis are sales attributed otherwise?
Throwback (rule): 25
Throwout (rule): 1
Origin (only): 3
Destination (only): 15
N/A: 7

TABLE IV

State	12A	12B	12C	13A	13B	15B
Alabama	NO	N/A	NO	YES	FF	Throwback
Alaska	YES	28	YES	YES	FF	Throwback
Arizona	YES	30	YES	YES	1954	Throwback
Arkansas	NO	N/A	NO	YES	FF	Throwback
California	YES	28	YES	NO[1]	N/A	Throwback
Colorado	YES	30	YES	YES	1960	Throwback[2]
Connecticut	YES	28	YES	YES	FF	Destination
Delaware	YES	30	YES	YES	1958	Destination
District of Columbia	NO	N/A	NO	YES	FF	Throwback
Florida	YES	30	N/A[3]	YES	1972	Destination
Georgia	YES	30	NO	YES	1969	Destination
Hawaii	YES	30	YES	YES	FF	Throwback
Idaho	YES	28	YES	YES	FF	Throwback
Illinois	YES	30	N/A[4]	YES	FF	Throwback
Indiana	YES	30	YES	YES	FF	Throwback
Iowa	YES	30	YES	YES	FF	Destination
Kansas	YES	30	YES	YES	FF	Throwback
Kentucky	YES	—[5]	YES	YES	1972	Destination
Louisiana	NO	N/A	NO	YES	c. 1948	Destination
Maine	YES	30	N/A[6]	YES	FF	Throwback
Maryland	YES	30	NO	YES	1968	Origin
Massachusetts	YES	28	YES	YES	FF	Throwback
Michigan	N/A	N/A	N/A	N/A	N/A	N/A
Minnesota	NO	N/A	NO	YES	1971	Destination
Mississippi	NO	N/A	NO	YES	1971	Origin

TABLE IV—Continued

State	12A	12B	12C	13A	13B	15B
Missouri	YES	30	NO	YES	1973	Throwback
Montana	YES	28	YES	YES	FF	Throwback
Nebraska	YES	30	N/A[7]	YES	FF	Throwback
Nevada	N/A	N/A	N/A	N/A	N/A	N/A
New Hampshire	YES	28	N/A	YES	1970	Throwback
New Jersey	YES	28	YES	YES	FF	Destination
New Mexico	YES	30	YES	YES	FF	Throwback
New York	YES	28	YES	YES	FF	Destination
North Carolina	YES	28	NO[8]	YES	FF	Destination
North Dakota	YES	30	YES	YES	FF	Throwback
Ohio	YES	28	N/A[9]	YES	1971	Destination
Oklahoma	YES	30	NO	YES	1971	Throwback
Oregon	YES[10]	28	NO	NO	N/A	Throwback
Pennsylvania	YES	28	YES	YES	1935	Throwout
Rhode Island	YES	28	NO	YES	FF	Destination
South Carolina	NO	N/A	NO	NO	N/A	Throwback
South Dakota	N/A	N/A	N/A	N/A	N/A	N/A
Tennessee	YES	28	NO	YES	FF	Destination
Texas	N/A	N/A	N/A	N/A	N/A	N/A
Utah	NO	N/A	NO	YES	FF	Destination
Vermont	YES	30	YES	YES	1966	Origin
Virginia	YES	30	NO	YES	1972	Throwback
Washington	N/A	N/A	N/A	N/A	N/A	N/A
West Virginia	YES	30	N/A[11]	YES	FF	N/A[12]
Wisconsin	NO[13]	N/A	NO	YES	1964	Throwback
Wyoming	N/A	N/A	N/A	N/A	N/A	N/A

FOOTNOTES—TABLE IV

[1]California uses the mid-point of the federal asset depreciation range as a guideline but does not allow the entire federal range for depreciation purposes.

[2]Colorado also permits corporations to use a two factor formula, sales and property. For this formula, all sales are attributed to state of destination. Colorado's three factor formula (UDITPA) requires that sales to the U.S. government be attributed to state of origin.

[3]Florida had no corporate income tax ten years ago.

[4]Illinois had no corporate income tax ten years ago.

[5]Kentucky uses federal taxable income "by definition"; i.e., it does not use any particular line of Form 1120, but it does follow federal definitions to arrive at taxable income. Kentucky's form then provides for a reconciliation with the federal return.

[6]Maine had no corporate income tax ten years ago.

[7]Nebraska had no corporate income tax ten years ago.

[8]North Carolina began using federal taxable income in determining the income base effective January 1, 1967.

[9]Ohio had no corporate income tax ten years ago.

[10]Oregon uses federal taxable income in determining the income base, not by statute, but by administrative practice.

[11]West Virginia had no corporate income tax ten years ago.

[12]West Virginia's formula has no sales factor.

[13]Wisconsin only uses federal taxable income in determining the Wisconsin taxable income of domestic insurance companies, real estate investment trusts, and regulated investment companies.

16(A). Does your state (ever) allow credit against use tax liability on (purchases) other than vehicles for sales tax due and paid in other states, with respect to the same purchase transaction and the same property?

YES: 42 NO: 4 N/A: 5

16(C). Did it do so 10 years ago?

YES: 32 NO: 11 N/A: 8

17. Does your state recognize and comply with the Uniform Sales and Use Tax Jurisdictional Standard of the Multistate Tax Commission?

YES: 23 NO: 23 N/A: 5

18. Does your state accept the Uniform Sales and Use Tax Exemption Certificate sponsored by the Multistate Tax Commission?
YES: 35 NO: 12 N/A: 4

19. Does your state furnish information (to other states) regarding out-of-state purchasers claiming exemption (from sales tax in those states)?
YES: 28 NO: 18 N/A: 5

TABLE V

State	16A	16C	17	18	19
Alabama	YES	YES	NO	YES	NO
Alaska	N/A	N/A	N/A	YES[1]	N/A
Arizona	YES	YES	YES	YES	NO
Arkansas	YES	YES	YES	YES	YES
California	NO	NO[2]	NO	NO[3]	YES[4]
Colorado	YES	YES	YES	YES	YES
Connecticut	YES	YES	NO	YES	YES
Delaware	N/A	N/A	N/A	N/A	N/A
District of Columbia	YES	YES	NO	YES	NO
Florida	YES	YES	NO	YES	NO
Georgia	YES	YES	NO	NO	NO
Hawaii	NO	YES	NO	YES	NO
Idaho	YES	NO	YES	YES	YES
Illinois	YES	YES	YES	YES	YES
Indiana	YES	YES	YES	YES	YES
Iowa	YES	YES	YES	YES	YES
Kansas	YES	YES	YES	YES	YES
Kentucky	YES	YES	YES	YES	YES
Louisiana	YES	YES	YES	YES	YES
Maine	YES	YES	YES	YES	YES
Maryland	YES	YES	YES	YES	YES
Massachusetts	YES	YES	YES	YES	YES
Michigan	YES	YES	YES	YES	YES
Minnesota	YES	N/A	YES	YES	YES
Mississippi	YES	YES	YES	YES	YES

TABLE V—Continued

State	16A	16C	17	18	19
Missouri	YES	YES	YES	YES	YES
Montana	N/A	N/A	N/A	N/A	N/A
Nebraska	YES	N/A	YES	YES	NO
Nevada	YES[6]	NO[6]	YES	YES	NO
New Hampshire	N/A	N/A	N/A	N/A	N/A
New Jersey	YES	YES	NO	NO	NO
New Mexico	NO	NO	YES[7]	NO	NO
New York	YES	YES	NO	NO	NO
North Carolina	YES	YES	NO	NO	NO
North Dakota	YES	YES	YES	YES	YES
Ohio	NO	N/A	NO	NO	NO
Oklahoma	YES	YES	NO	YES	NO
Oregon	N/A	N/A	N/A	N/A	N/A
Pennsylvania	YES	YES	NO	YES	YES
Rhode Island	YES	YES	NO	YES	YES
South Carolina	NO	NO	NO	YES	YES
South Dakota	YES	NO	YES	YES	YES
Tennessee	YES	YES	YES	YES	YES
Texas	YES	YES	YES	YES	YES
Utah	YES	NO[8]	YES	YES	YES
Vermont	YES	YES	NO	YES	YES
Virginia	YES	YES	NO	YES	YES[10]
Washington	YES	NO[9]	YES	YES	YES
West Virginia	NO	NO	NO	NO	YES
Wisconsin	YES	YES	NO	YES	NO
Wyoming	YES	YES	YES	YES	NO

FOOTNOTES—TABLE V

[1]Alaska accepts the Uniform Exemption Certificate for Gross Receipts Tax Purposes. Alaska does not impose a sales or use tax at the state level.

[2]California did not allow credit against use tax liability prior to July 1, 1967 for purchases other than passenger vehicles.

[3]California has made certain modifications to the certificate, and if adopted would accept the modified certificate.

[4]California furnishes information only with the Governor's authorization. At present, such authorization exists for several states.

[5]Minnesota did not enact its sales tax until 1967.

[6]Nevada allows credit against use tax liability only on purchases made in full voting member states of the Multistate Tax Commission, on all tangible personal property. Nevada enacted the Multistate Tax Compact in 1967.

[7]New Mexico taxpayers are required to use special New Mexico certificates.

[8]Utah enacted its credit against use tax liability provision in 1967.

[9]Washington had no credit against use tax liability prior to enacting the Multistate Tax Compact in 1967.

[10]Washington has no procedure for automatically furnishing information regarding out-of-state purchasers claiming exemption. Vendors are not required to file reports identifying purchasers, thus, information is not readily available and could only be developed through audit.